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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 28

CITIES SERVICE OIL COMPANY, PETITIONER,

vs.

B. P. DUNLAP ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 6, 1939.

CERTIORARI GRANTED MAY 1, 1939.

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UNITED STATES OF AMERICA
UNITED STATES CIRCUIT COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT

PLEAS AND PROCEEDINGS had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in November, A. D. 1938, at Fort Worth, Texas, before the Honorable Samuel H. Sibley, the Honorable Edwin R. Holmes and the Honorable Leon McCord, Circuit Judges:-

CITIES SERVICE OIL COMPANY,
Appellant,

versus

B. P. DUNLAP, ET AL.,
Appellees.

BE IT REMEMBERED, That heretofore, to-wit, on the 8th day of July, A. D., 1938, a transcript of the record in the above styled cause, pursuant to an appeal from the District Court of the United States for the Eastern District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 8863, as follows, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

No. 8863.

CITIES SERVICE OIL COMPANY, (FORMERLY EMPIRE OIL AND REFINING COMPANY), SUBSTITUTED AS COMPLAINANT IN LIEU OF EMPIRE GAS & FUEL COMPANY,

Appellant,

versus No. 803 In Equity.

B. P. DUNLAP, ET AL.,

Appellees.

Appeal from the District Court of the United States, for the Eastern District of Texas.

CAPTION.

BE IT REMEMBERED, that at a regular term of the District Court of the United States in and for the Eastern District of Texas, in the Tyler Division thereof, Fifth Circuit, the Honorable Randolph Bryant, a United States District Judge, then and there presiding, held a session of said Court at the City of Tyler, Texas; that said term of Court began on the 10th day of February, A. D. 1936, and continued to and terminated by operation of law on the 3rd day of October, A. D. 1936; that during said term of Court there came on to be heard, on the 27th day of April, A. D. 1936, this cause and the trial of said cause continued from day to day, whereupon, at the conclusion of the evidence the Court announced that he would take said cause under advisement and enter a decree at a later date. Whereupon, the Court took said cause under consideration and thereafter, at a regular term of said Court begun and holden at Tyler, Texas, on the 14th day of February, A. D. 1938, which said term has not yet terminated, the Court, on the 30th day of April, A. D. 1938, entered a decree in the following cause:

Empire Gas & Fuel Company, (Cities Service Oil Company, formerly Empire Oil & Refining Company, Substitute Complainant),

vs. #803 In Equity.

B. P. Dunlap, et al.

---

2 BILL OF COMPLAINT.

In the District Court of the United States for the Eastern District of Texas, Tyler Division.

Empire Gas & Fuel Company,

vs. No. 803 In Equity.

B. P. Dunlap, et al.

To the Honorable Randolph Bryant, Judge:

Empire Gas & Fuel Company, a private corporation, duly incorporated under the laws of the State of Maine, and a citizen, resident and inhabitant of such state, doing business in Texas under and by virtue of a permit duly issued by the Secretary of State, with an office and agent in Gregg County, Texas, plaintiff, complains of the hereinafter named defendants, each a resident, citizen and inhabitant of the County and State immediately following his name, to-wit: B. P. Dunlap, Dallas County, Texas, F. E. Rogers, Gregg County, Texas, W. H. Rogers, Gregg County, Texas, Mrs. L. J. Rogers, Gregg County, Texas, J. E. Rogers, Gregg County, Texas, and wife, Ola Mae Rogers, Gregg County, Texas, Elvie (Rogers) Waskom, Gregg County, Texas, and husband, Azzie Waskom, Gregg County, Texas, J. R. Bozman, Gregg County, Texas, and wife, Olga Bozman, Gregg County, Texas, J. T. Brewer, Taylor County, Texas, and wife, Garnett Brewer, Taylor County, Texas, B. F. Phillips, Gregg County, Texas,

Curtis M. Willock, Pasadena, California, and J. B. Parker, Jena, Louisiana; and for cause of action plaintiff says:

I.

A diversity of citizenship exists in this cause entitling plaintiff to sue in that plaintiff is a corporation
3 incorporated under the laws of the State of Maine and a citizen, resident and inhabitant of such state as hereinbefore set forth, and the defendants are each and all residents, citizens and inhabitants of states other than the state of Maine, and a part of said defendants reside in the Tyler Division of the Eastern District of this Honorable Court, and the land here in controversy is situated in Gregg County, Texas, within this division of this Honorable Court. The amount in controversy exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs, in that the oil, gas and mineral estate owned by plaintiff, hereinafter more particularly alleged insofar as same covers the acreage in controversy in the tracts hereinafter described, is worth far in excess of Three Thousand Dollars ($3,000.00), and such estate herein sought to be established and the title thereto quieted is of a reasonable cash market value greatly in excess of the sum of Three Thousand Dollars ($3,000.00) exclusive of interest and costs, and the mineral interest claimed by the defendants and sought to be recovered by the plaintiff and its title thereto quieted is of the reasonable cash market value in excess of Three Thousand Dollars ($3,000.00), and the oil and gas which will be removed from said land by defendants unless plaintiff is granted the relief herein sought will far exceed the reasonable market value of Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

II.

Heretofore on February 28, 1899, by deed recorded in Volume R, page 59, of the Deed Records of Gregg Coun-

ty, Texas, J. W. Rogers, W. H. Rogers and F. E. Rogers conveyed to J. F. Rogers all that certain tract or parcel of land situated in Gregg County, Texas, being a part of the Geo. A. Thomason Survey,

Starting at the N. E. corner of Lot No. 2 which is the N. W. corner of W. H. Rogers tract Lot 1;

Running West 440 yards to Wiley Davis N. E. corner;

Thence South 880 yards;

Thence East 224 yards;

Thence North 310 yards at 12 deg. East of North;

Thence East 154 yards to W. H. Rogers line;

Thence North 572 yards to starting point, containing 68-1/5 acres, more or less.

the parties to said deed having theretofore owned said land, and other lands, and said deed and other deeds of the same date having effected a partition thereof. Thereafter by deed dated May 7, 1917, filed in the office of the Clerk of Gregg County, Texas, on May 10, 1917, and recorded in Vol. 32, page 563; of said Records, Mrs. L. J. Rogers, Elvie Waskom and husband, Azzie Waskom, and J. E. Rogers conveyed to J. W. Mings all that certain lot or parcel of land in Gregg County, Texas, a part of the said G. A. Thomason H. R. Survey.

Beginning at the N. W. corner of our 68-acre tract, said beginning corner is about 953 vrs. West of the N. E. corner of said G. A. Thomason H. R. Survey;

Thence East 147 feet to corner on the N. B. line of G. A. Thomason Survey, witness P. O. tree about 12 in. diam. brs. W. 5 feet;

Thence South with fence 757 feet to corner, said corner being 21 feet S. E. of S. E. corner of residence;

Thence West 115 feet to E. side of Union Grove Public Road, witness B. J. tree brs. N. about 10 deg. East 75 ft.

Thence with meanderings of said road to the place of beginning, containing about two acres of land, more or less.

Subsequent to February 28, 1899, and prior to May 7, 1917, the said J. F. Rogers died intestate, leaving surviving him his wife, Mr. L. J. Rogers, and two children, the said Elvie Waskom and J. E. Rogers, as his sole surviving heirs at law, and no administration was had upon his estate and no necessity existed therefor. On the date of October 20, 1930, the said Mrs. L. J. Rogers, F. E. Rogers and Elvie Waskom owned and claimed and were in possession of the hereinafter described land as being the property described in said deed from J. W. Rogers, W. H. Rogers and F. E. Rogers (except said two acres) as well as by virtue of the statutes of limitation of the State of Texas of five, ten and twenty-five years,
5 they and their predecessors in title having for a period of more than twenty-five consecutive years held, used, cultivated and occupied said hereinafter described tract of land, paying taxes thereon and claiming the same in good faith under deeds purporting to convey the same duly registered in the Deed Records of Gregg County, Texas, such use being open, notorious, continuous, peaceable and adverse to the whole world, such land so possessed being actually and more particularly described as follows:

Being a part of the G. A. Thomason headright, situated in Gregg County, Texas.

Starting at the N. E. corner of Lot No. 2, which is the N. W. corner of the W. H. Rogers tract No. 1,

Thence N. 89 44′ W. a distance of 1228.19 ft. to N. E. corner of 2-acre tract above described.

Thence S. 0 56′ W. a distance of 726.32 ft. to S. E. corner of said 2-acre tract,

Thence S. 80 59′ W. a distance of 118.34 ft. to S. W. corner of said 2-acre tract on Clark's E. line,

Thence S. 1 03′ E. a distance of 1919.14 ft. to King's N. W. corner on Haynes' E. B. line,

Thence N. 89 30′ E. a distance of 738.89 ft.,

Thence N. 10 36′ E. a distance of 940.45 ft.,

Thence N. 88 31′ E. a distance of 462.24 ft.,

Thence N. 1 29′ W. a distance of 1715.64 ft. to the point of beginning said tract to contain 66-1/5 acres, more or less.

It being the intention of the Lessor herein to lease all land owned by them in said survey.

On said date of October 20, 1930, L. J. Rogers, J. E. Rogers, A. S. Waskom (who is one and the same person as Azzie Waskom), and his wife, Elvie Waskom, by their certain oil, gas and mineral lease granted and conveyed to W. P. Chandler all of the oil, gas and minerals in, on and under the tract of land last above described, said lease containing the description of the 66-1/5 acres first above contained and excepting said 2-acre tract, and thereafter stating "it being the intention to include all land owned or claimed by lessor in said surveys," which said lease was duly filed for record in the office of the Clerk of Gregg County, Texas, on November 18, 1930, and recorded in Volume 61, page 295 of the Deed Records of

said county. By assignment and conveyance
6 plaintiff became on October 21, 1930, the owner of said oil, gas and mineral leasehold estate and immediately went into possession thereof, and in conformation of said lease, said lessors and Ola Mae Rogers, wife of the said J. E. Rogers, executed to plaintiff another lease dated May 8, 1931, now recorded in Volume 84, page 516 of said Deed Records, and plaintiff is now the owner and in possession thereof and of all of the oil, gas and minerals in and under the land last above described, subject to the payment of the rentals and royalties provided to be paid by said lease, all of which have been paid in accordance with the terms thereof.

III.

Long subsequent to the leases to W. P. Chandler and plaintiff hereinbefore stated, and long subsequent to the vesting of the rights of plaintiff and its predecessors in title in and to its said oil, gas and mineral leasehold estate, defendant, B. P. Dunlap, secured from F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, J. E. Rogers and wife, Ola Mae Rogers, and Elvie (Rogers) Waskom, a purported oil, gas and mineral lease dated October 10th, 1934, filed in the office of the Clerk of Gregg County, Texas, on October 19th, 1934, recorded in Volume 170, page 602 of the Deed Records of said County, purporting to convey to the said Dunlap the leasehold estate in a tract of land between the west line of the J. F. Rogers Tract of land as surveyed in the year 1899, the east line of the G. W. Clark and M. P. Haynes tracts or some other tract well known to defendants, and while plaintiff does not admit but expressly denies that any such tract of land in fact exists, yet if there be such tract of land the title to the oil, gas and mineral leasehold estate in and to the same is owned by plaintiff by virtue of the facts hereinbefore alleged, said purported tract being described in said lease as follows:

7 Beginning at an old steel shaft about 2" in diameter with an old bevel gear wheel on upper

end, as a land mark stake set for the W. N-W. corner of a 176 acre tract of land and the S-W. corner of the J. F. Rogers tract of land by the surveyor on the ground in the year 1899;

Thence Northerly along the W. B. line of said J. F. Rogers tract of land to the N-W. corner thereof on the N. B. line of the said headright survey a distance of about 880 yards;

Thence West 66.89 feet to the N-E. corner of the Clark land which is also the N-W. corner of the Alexander Rogers original tract of land prior to the junior surveys thereof made in the year 1899;

Thence Southerly 880 yards along the East boundary lines of the Clark land and the Haynes land, which is also the West boundary line of the said Alexander Rogers land, to a 1¼" iron pipe stake set in the West boundary line of the said Alexander Rogers tract of land, the same being the S-W. corner of this tract;

Thence East 66.89 feet to the place of beginning and containing five (5) acres of land, more or less.

Save and except about 2 acres of land conveyed to J. W. Mings by Mrs. L. J. Rogers, et al., by deed dated May 7, 1917, and recorded in Volume 32, page 564, Deed Records of Gregg County, Texas.

In said lease, the lessors retained an oil payment of Twenty-five Hundred Dollars ($2500.00) per well, payable out of one-eighth of seven-eighths (1/8 of 7/8) of the oil produced from said purported tract.

Defendant, J. T. Brower, secured an oil, gas and mineral lease covering the same purported tract of land and other land from J. R. Bozman and wife, Olga Bozman, dated August 2, 1934, filed in said office August 8, 1934.

and recorded in Volume 168, page 573 of said Records, said lease containing as a description of the land covered thereby the following:

Situated in the George A. Thomason Survey, Gregg County, Texas, about two (2) miles East of the Town of Gladewater, Texas, and being a strip of land approximately sixty (60) feet east and west, and approximately three thousand five hundred (3,500) feet north and south, lying east of and immediately adjacent to that certain 202-acre tract of land known as the J. M. Haynes tract of land as described in that certain deed from J. R. Bozeman and Olga Bozeman to J. M. Haynes, dated June 22, 1917, and recorded in Volume 33, at page 74 of the Deed Records of Gregg County, Texas, to which reference is here made.

8 As further consideration for the execution of this oil and gas lease, lessee agrees to, at his own cost and expense, clear the title to the stript of land herein conveyed, and use his best efforts to make the title thereto merchantable; lessee further agrees to immediately have said strip of land surveyed in order to determine the exact boundaries of same as well as the exact number of acres comprized therein, and in this connection it is the intention of the lessors herein that this oil and gas lease shall cover the tract of land included within said survey to be made by lessee, whether the lines and boundaries of same are longer or shorter than as herein approximately stated; in the event lessee is successful in effecting a good and merchantable title to said tract of land, he agrees to drill and complete a well thereon for the production of oil and gas as soon as practicable after perfection of a merchantable title.

It is understood and agreed by and between the undersigned that upon completion of a producing well on the tract of land herein mentioned, that the oil royalty under said well shall be owned by J. R. Bozeman & wife, Olga

Bozman. It being the intention to include all land owned or claimed by Lessor in said survey or surveys whether correctly above described or nor.

By assignment dated September 22, 1934, filed in said office September 28, 1934, recorded in Volume 170, page 388 of said Deed Records, the said J. T. Brewer conveyed said purported lease to defendant, B. F. Phillips, and Brewer retained an oil payment of Fifteen Thousand Dollars ($15,000.00), to be paid out of five-thirty-seconds of seven-eighths (5/32 of 7/8) of the oil produced from said land, described in said assignment as follows:

Being a narrow strip of land lying between the land now owned by *J. L.* Rogers on the East and the land of J. M. Haynes on the West, and located in the Geo. A. Thomason Survey, about two miles East of the town of Gladewater, Texas, and described by metes and bounds as follows:

Beginning at an iron stake set for the southwest corner of the said *L. J.* Rogers 70-acre tract in the Geo. A. Thomason survey in Gregg County, Texas;

Thence North with the west line of the said Rogers tract 1190 ft. to a stake set in the south right of way line of the Longview and Gladewater highway;

Thence North approximately 70 deg. West with the south line of the said highway 32 ft. to a stake for the northwest corner of this tract and the northeast corner of the Haynes tract;

Thence south with the said Haynes East boundary line 3030 ft. to an iron stake by an old pine knot set for the most eastern southeast corner of the said Haynes tract and the northeast corner of the Mrs. M. C. Sheppard 36-acre tract;

Thence North 1 deg. East 1830 ft. to the place of beginning, and containing 1.42 acres of land more or less, which said oil and gas lease is recorded in the Deed Records of Gregg County, Texas, under file register #7603.

And said Brewer was to be paid the further sum of Twenty-three Hundred Dollars ($2300.00) upon the spudding in of the first well on said purported tract. By further assignment dated November 17, 1934, recorded in Volume 174, page 56 of said Records, the said J. T. Brewer confirmed said assignment to B. F. Phillips and assigned to his wife, Garnett Brewer, all his purported right, title and interest in said purported tract except Two Thousand Dollars ($2,000.00), to be paid out of one-thirty-second of seven-eighths (1/32 of 7/8) of all the oil saved, sold and produced. And the said defendants have been actively engaged since the respective dates of said leases and assignments in asserting title to said purported tracts of land and in attempting to drill a well and wells for oil and gas thereon, claiming that said purported tracts of land cover approximately five (5) acres off the West side of plaintiff's oil, gas and mineral lease. Said defendants, or one or more of them, their relation being well known to themselves but not to plaintiff, are now commencing operations for drilling and are erecting a derrick for the purposes of drilling a well for oil and/or gas upon said approximate five acres and upon plaintiff's lease and are proceeding to drill a well for oil and gas thereon, all without right and unless prevented by injunction will drill said well to production and take and remove large quantities of oil and gas from said property and convert the same to their own use to plaintiff's great and irreparable damage and injury. Said instruments to and from the said Dunlap and Brewer and claims of the defendants and their activities as aforesaid and the record of said instruments cast clouds upon plaintiff's title to its said property and greatly damage and depreciate

the value of plaintiff's mineral estate, and plaintiff is without adequate remedy at law.

IV.

The defendants Curtis M. Willock and J. B. Parker own interests in the minerals in and under said land, subject to plaintiff's lease, and in the royalties payable by the terms of said lease, and should be required to plead herein and set up their rights to the land in controversy herein. In this connection, plaintiff shows that each of the defendants and their predecessors in title have executed instruments admitting that plaintiff's lease covers said purported strips of land, and plaintiff has relied thereon and spent over Fifty Thousand Dollars ($50,000.00) in the development of said land for oil and gas, which program of development was carried out upon the facts so represented to plaintiff, and if such strips be held to exist and not owned by plaintiff, plaintiff would now be required to drill further wells at a cost of more than Ten Thousand Dollars ($10,000.00) each, and such further wells are wholly unnecessary to adequately and economically recover all of the oil underlying plaintiff's lease. By reason thereof, defendants and each of them have ratified plaintiff's lease as covering said purported strips, and are estopped to assert that such purported strips are not covered by plaintiff's lease.

V.

Plaintiff further shows that said purported strips of land in controversy herein have been used by the public, including plaintiff, as a road for more than twenty-five years next preceding the filing of this suit, and said strips are burdened with an easement for road purposes in favor of the public, and the drilling of oil and gas wells thereon by defendants and each of them will deprive plaintiff and other members of the public of their right

to use said road and will interfere with the use of said road by plaintiff, to which use plaintiff is entitled.

11 Wherefore, plaintiff sues and prays that the defendants, and each of them, be cited to appear and answer in this behalf, that upon hearing hereof plaintiff recover the title and possession of its said property and be quieted in the title and possession thereof as against each and all of the defendants, that the clouds cast by the claims and operations of the defendants and the instruments under which they claim and the records thereof be removed therefrom and the defendants adjudicated to own no right, title or interest therein or thereto, and in the alternative, that said strips be adjudicated a public road and defendants denied the right to drill wells for oil and gas thereon or to produce oil and gas therefrom; and that plaintiff recover its costs and such other relief, general and special, as it may be entitled to under the premises. Pending a hearing hereof, plaintiff prays for temporary injunction restraining the defendants, and each of them, their agents and employees, successors and assigns, from drilling or developing the purported approximate five acres or any part of plaintiff's property for oil and/or gas and from further interfering with plaintiff and its possession, use and development of the aforesaid premises, and that upon trial hereof such injunction be made permanent.

PHILLIPS, TRAMMELL, CHIZUM,
ESTES & EDWARDS,
CECIL N. COOK,
JOE E. ESTES,
Attorneys for Plaintiff.

Bill of Complaint—Filed December 18, 1934.

MOTION OF DEFENDANT B. P. DUNLAP TO DISMISS BILL OF COMPLAINT.

12 (Title Omitted.)

To the Honorable Randolph Bryant, Judge:

Now comes the defendant, B. P. Dunlap, and moves that the Court dismiss the complainants bill for the reason that the same shows upon its face that it is without equity.

Said defendant further moves that said bill be dismissed for the reason that it appears that the bill is brought in the guise of a suit to remove cloud from title, and there is no express allegation that the plaintiff is in possession of the property; but, to the contrary, it affirmatively appears from the face of the bill that they are not in possession—the prayer of the bill being for title and possession.

The said defendant further moves that the bill be dismissed for the reason that it appears from the face of the bill that there is a misjoinder of causes of action, in that two separate and distinct tracts of land are involved, owned and claimed by separate and distinct parties defendant.

Defendant further moves that the bill be dismissed for the reason that there is a misjoinder of parties defendant, for the reason that it appears from the face of the bill that there is no connection between the claim of the defendant Brewer, holding under the Bozman title, and the other defendants holding under the Rogers title.

Wherefore, this defendant prays that the bill be dismissed.

WYNNE & WYNNE,
Attorneys for Defendant,
B. P. Dunlap,
By W. A. WADE.

Filed January 16, 1935.

MOTION OF DEFENDANTS J. T. BREWER, ET AL., TO DISMISS BILL OF COMPLAINT.

13 (Title Omitted.)

To the Honorable Randolph Bryant, Judge of said Court:

Come now the defendants, J. T. Brewer and wife, Garnett Brewer, B. F. Phillips, and J. R. Bozman and wife, Olga Bozman, and move that this Honorable Court dismiss the Bill of Complaint filed herein as against them and for good cause would show the following:

(a) That the same does not state any matter of equity entitling the plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against these defendants.

(b) That the plaintiff herein is not in possession of said tract of land, therefore cannot be heard in a Bill to quiet title against those in possession because said plaintiff has a full, adequate and complete remedy at law and that the defendants are entitled to a jury trial.

(c) That it appears on the face of the Bill that the real purpose of this suit is to try the title to the land in controversy and from the facts alleged the title to the land is put in issue and a bill in equity in the nature of one to remove cloud from title is not the proper remedy to determine a controversy between the parties as to the title to the real estate owned and claimed by these defendants.

(d) Because the plaintiff has an adequate and sufficient remedy at law; that it is not within the jurisdiction of equity to adjudicate upon conflicting titles of parties to real estate and since it appears from the face of the Bill that the title to the tract of land which is owned and claimed by these defendants is not in the chain of title to the plaintiff, nor a part thereof, and that

it is not only incumbent upon the plaintiff to allege that it is in possession of the property but that its
14 title has been established at law by at least one successful suit, and since it has not made any such allegations the Bill should be dismissed.

Wherefore, premises considered, the defendants and each of them pray the judgment of this Court whether they or either of them shall further answer, and that they and each of them be dismissed with their costs.

CAMPBELL & LEAK,
Attorneys for defendants, J. T. Brewer, Garnett Brewer, B. F. Phillips, J. R. Bozman and Olga Bozman.

Filed Jan. 25, 1935.

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15 MOTION OF DEFENDANTS F. E. ROGERS, ET AL., TO DISMISS BILL OF COMPLAINT.

(Title Omitted.)

To the Honorable Randolph Bryant, Judge:

Now come the defendants F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, J. E. Rogers, Ola Mae Rogers, Elvie (Rogers) Waskom and Azzie Waskom and move that the Court dismiss the complainants bill for the reason that the same shows upon its face that it is without equity.

Said defendants further move that said bill be dismissed for the reason that it appears that the bill is brought in the guise of a suit to remove cloud from title, and there is no express allegation that the plaintiff is in possession of the property; but, to the contrary, it affirmatively appears from the face of the bill that they are not in possession—the prayer of the bill being for title and possession.

The said defendants further move that the bill be dismissed for the reason that it appears from the face of the bill that there is a misjoinder of causes of action in that two separate and distinct tracts of land are involved, owned and claimed by separate and distinct parties defendant.

Defendants further move that the bill be dismissed for the reason that there is a misjoinder of parties defendant, for the reason that it appears from the face
16 of the bill that there is no connection between the claim of the defendant Brewer, holding under the Bozman title, and the other defendants holding under the Rogers title.

Wherefore, these defendants pray that the bill be dismissed.

WYNNE & WYNNE,
Attorneys for said named Defendants,
By W. A. WADE.

Filed March 21, 1935.

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17 ORDER OF DISMISSAL AS TO DEFENDANTS J. T. BREWER, ET AL.

(Title Omitted.)

On this May 13, 1935, before the Court in session came the plaintiff and stated to the Court that it was of opinion that in view of the plea of misjoinder of the defendants, J. T. Brewer and wife, Garnett Brewer, B. F. Phillips and J. R. Bozman and wife, Olga Bozman, it desired to dismiss its suit as against said defendants without prejudice and no objection being made thereto, it is

Ordered, Adjudged and Decreed that plaintiff's suit be and it is hereby dismissed as to the defendants, J. T. Brewer and wife, Garnett Brewer, B. F. Phillips, and J. R. Bozman and wife, Olga Bozman, without prejudice, at plaintiff's cost, this dismissal, however, not to affect plaintiff's right to hereafter bring suit against said defendants in any other proceeding or Court, and to be without prejudice to plaintiff's suit herein as against the remaining defendants.

RANDOLPH BRYANT,
Judge.

Filed May 18, 1935.

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18 WAIVER OF SUBPOENA BY CURTIS M. WILLOCK, ET AL.

(Title Omitted.)

The defendants, Curtis M. Willock and J. B. Parker, acknowledge receipt of a copy of the original bill of complaint filed herein by Empire Gas & Fuel Company and enter their appearance in this cause as fully as if they had been served with subpoenas herein.

CURTIS M. WILLOCK, and
J. B. PARKER,
By CECIL N. COOK,
Attorney of Record.

Filed as of January 10, 1935.

19 MOTION OF COMPLAINANT FOR LEAVE TO FILE AMENDED BILL.

(Title Omitted.)

To the Honorable Randolph Bryant, Judge:

Empire Gas & Fuel Company respectfully shows that since the institution of this suit there have been certain of the defendants dismissed therefrom, rendering the allegations in the original petition as to such defendants and their claims surplusage, and that it is necessary for such reason, and in order to properly and adequately state plaintiff's rights and cause of action, to file an amended bill herein, which amended bill is herewith presented. Counsel for defendants have, prior to the filing hereof, been furnished with a copy of such amended petition.

Wherefore, plaintiff prays for the entry of an order granting it leave to file such petition and that such further proceedings be had herein as equity may require.

PHILLIPS, TRAMMELL, CHIZUM, ESTES & EDWARDS,
HARRY O. COWING, JR.,
DAVID B. TRAMMELL,
Attorneys for Plaintiff.

Filed January 11, 1936.

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20 ORDER GRANTING COMPLAINANT LEAVE TO FILE AMENDED BILL.

(Title Omitted.)

On this January 11th, 1936, before the Court in session, came on to be heard the application of plaintiff for leave

to file amended bill, and such motion being heard, it is hereby granted and the Clerk hereof is hereby directed to file the amended petition accompanying such motion.

RANDOLPH BRYANT,
Judge.

Filed January 11, 1936.

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21 AMENDED BILL OF COMPLAINT.

(Title Omitted.)

To the Honorable Randolph Bryant, Judge:

Empire Gas & Fuel Company, a corporation, incorporated under the laws of the State of Maine, and a citizen, resident and inhabitant of such state, transacting business in Texas under a permit, with an office and agent in Gregg County, Texas, complaining of B. P. Dunlap, a citizen, resident and inhabitant of Dallas County, Texas, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers; Elvie (Rogers) Waskom and her husband, Azzie Waskom, all citizens, residents and inhabitants of Gregg County, Texas, Curtis M. Willock, a citizen, resident and inhabitant of Pasadena, California, and J. B. Parker, a citizen, resident and inhabitant of Jena, Louisiana, all defendants, with leave of Court, files this its First Amended Original Petition, and for cause of action respectfully represents:

I.

A diversity of citizenship exists in this cause entitling plaintiff to sue in that plaintiff is a corporation incorporated under the laws of the State of Maine and a citizen, resident and inhabitant of such state as hereinbefore set forth, and the defendants are each and all residents,

citizens and inhabitants of states other than the state of Maine, and a part of said defendants reside in the Tyler Division of the Eastern District of this Honorable Court, and the land here in controversy is situated in
22 Gregg County, Texas, within this division of this Honorable Court. The amount in controversy exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs, in that the oil, gas and mineral estate owned by plaintiff, hereinafter more particularly alleged insofar as same covers the acreage in controversy in the tracts hereinafter described, is worth far in excess of Three Thousand Dollars ($3,000.00), and such estate herein sought to be established and the title thereto quieted is of a reasonable cash market value greatly in excess of the sum of Three Thousand Dollars ($3,000.00) exclusive of interest and costs, and the mineral interest claimed by the defendants to which plaintiff seeks to quiet its title is of the reasonable cash market value in excess of Three Thousand Dollars ($3,000.00), and the oil and gas which will be removed from said land by defendants unless plaintiff is granted the relief herein sought will far exceed the reasonable market value of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

II.

Heretofore on February 28, 1899, by deed recorded in Volume R, page 59, of the Deed Records of Gregg County, Texas, J. W. Rogers, W. H. Rogers and F. E. Rogers conveyed to J. F. Rogers all that certain tract or parcel of land situated in Gregg County, Texas, being a part of the Geo. A. Thomason Survey,

Starting at the N. E. Corner of Lot No. 2 which is the N. W. Corner of W. H. Rogers tract, Lot 1;

Running West 440 yards to Wiley Davis N. E. corner;

Thence South 880 yards;

Thence East 224 yards;
Thence North 310 yards at 12 deg. East of North;
Thence East 154 yards to W. H. Rogers line;
Thence North 572 yards to starting point, containing 68-1/3 acres, more or less;

23 the parties to said deed having theretofore owned said land, and other lands, and said deed and other deeds of the same date having effected a partition thereof. At the time such deed was executed the Wiley Davis northeast corner was a well established corner, located and established on the ground, and a road had been established along such common line running southward to and across the public road and along the line between the Bozeman (now the Haynes) east line and the Rogers west line south of said road. Such Wiley Davis northeast corner at that time existed in such road, and such deed was intended to and did convey to said J. F. Rogers the tract of land joining the Wiley Davis tract at its northeast corner and running south with such Davis tract and the west line of the tract now owned by J. M. Haynes to the southwest corner of said J. F. Rogers tract as set forth in such deed.

III.

By deed dated May 7, 1917, filed in the office of the Clerk of Gregg County, Texas, on May 10, 1917, and recorded in Vol. 32, page 563 of said Records, Mrs. L. J. Rogers, Elvie Waskom and husband, Azzie Waskom, and J. E. Rogers conveyed to J. W. Mings all that certain lot or parcel of land in Gregg County, Texas, a part of the said G. A. Thomason H. R. Survey.

Beginning at the N. W. Corner of our 68-acre tract, said beginning corner is about 953 vrs. West of the N. E. corner of said G. A. Thomason H. R. Survey;

Thence East 147 feet to corner on the N. B. line of G. A. Thomason Survey, witness P. O. tree about 12 in. dia., brs. W. 5 feet;

Thence South with fence 757 feet to corner, said corner being 21 feet S. E. of S. E. corner of residence;

Thence West 115 feet to E. side of Union Grove public road, witness B. J. tree brs. N. about 10 deg. East 75 ft.

Thence with meanderings of said road to the place of beginning, containing about two acres of land, more or less.

Subsequent to February 28, 1899, and prior to May 7, 1917, the said J. F. Rogers died intestate, leaving surviving him his wife, Mrs. L. J. Rogers, and two children, the said Elvie Waskom and J. E. Rogers, as his
24 sole surviving heirs at law, and no administration was had upon his estate and no necessity existed therefor. On the date of October 20, 1930, the said Mrs. L. J. Rogers, F. E. Rogers and Elvie Waskom owned and claimed and were in possession of the hereinafter described land as being the property described in said deed from J. W. Rogers, W. H. Rogers and F. E. Rogers (except said two acres above described) as well as by virtue of the statutes of limitation of the State of Texas of five, ten and twenty-five years, they and their predecessors in title having for a period of more than twenty-five consecutive years held, used, cultivated and occupied said hereinafter described tract of land, paying taxes thereon and claiming the same in good faith under deeds purporting to convey the same, duly registered in the Deed Records of Gregg County, Texas, such use being open, notorious, continuous, peaceable and adverse to the whole world.

IV.

On said date of October 20, 1930, L. J. Rogers, J. E. Rogers, A. S. Waskom (who is one and the same person as Azzie Waskom), and his wife, Elvie Waskom, by their certain oil, gas and mineral lease granted and conveyed to W. P. Chandler all of the oil, gas and minerals in, on and under the tract of land last above described, said lease containing the description of the 66 1/5 acres first above contained and excepting said 2-acre tract, and thereafter stating "it being the intention to include all land owned or claimed by lessor in said surveys", which said lease was duly filed for record in the office of the Clerk of Gregg County, Texas, on November 18, 1930, and recorded in Volume 61, page 295 of the Deed Records of said County. By assignment and conveyance plaintiff became on October 21, 1930, the owner of said oil, gas and mineral leasehold estate and immediately went into possession thereof, and in confirmation of said lease, said lessors and Ola Mae Rogers, wife of the said J. E. Rogers,
executed to plaintiff another lease dated May 8,
25 1931, now recorded in Volume 84, page 516 of said Deed Records, and plaintiff is now the owner and in possession thereof and of all of the oil, gas and minerals in and under the said land above described, subject to the payment of the rentals and royalties provided to be paid by said lease, all of which have been paid in accordance with the terms thereof. While the land was described in said confirmation lease as follows:

Being a part of the G. A. Thomason headright.

Starting at the N. E. corner of Lot No. 2 which is the N. W. corner of the W. H. Rogers tract No. 1, thence N. 89 44' W. a distance of 1228.19 ft., thence S. 0 56' W. a distance of 726.32 ft., thence S. 80 59' W. a distance of 118.34 ft., thence E. 1 03' E. a distance of 1919.14 ft., thence N. 89 30' E. a distance of 738.89 ft., thence N. 10 36' E.

a distance of 940.45 ft., thence N. 88 31' E. a distance of 462.24 ft., thence N. 1 29' W. a distance of 1715.64 ft. to the point of beginning said tract to contain 66 1/5 acres more or less.

It being the intention of the Lessor herein to lease all land owned by them in said Survey, and containing 66 1/5 acres, more or less,

it was intended to cover and include all land covered by said original lease, the description of which is hereinabove set out, in paragraph II, and it was in contemplation of the parties at the time, and intended that such confirmation lease should cover and include all of the land owned by said lessors in said common survey, and such provision was embraced in the aforesaid instrument as above copied for such purpose, and called to the attention of the lessors and discussed with them at the time of the execution of such confirmation and correction lease, by reason of which plaintiff shows to the Court that if there is any discrepancy between the two descriptions, and if in fact the description last above copied does not include all of the land covered by the description in paragraph II hereof, nevertheless, the defendant lessors owned all of said land at such time, and it was in a common survey, and all such land was covered and included within the description of such confirmation lease, and was intended to be and was granted and conveyed to plaintiff for the purposes set forth in said oil, gas and mineral lease, such lessors at such time owning
26 the land extending on the west to the land now owned by J. M. Haynes on the south and G. W. Clark on the north, and the oil and gas lease to the defendant Dunlap executed by the defendants Rogers and Waskom, hereinafter referred to, conveyed no title, interest or right to the defendant Dunlap, and vested in the said Dunlap no interest therein.

V.

Long subsequent to the leases to W. P. Chandler and plaintiff hereinabove stated, and long subsequent to the vesting of the rights of plaintiff and its predecessors in title in and to its said oil, gas and mineral leasehold estate, defendant, B. P. Dunlap, secured from F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, J. E. Rogers and wife, Ola Mae Rogers, and Elvie (Rogers) Waskom, a purported oil, gas and mineral lease dated October 10th, 1934, filed in the office of the Clerk of Gregg County, Texas, on October 19th, 1934, recorded in Volume 170, page 602 of the Deed Records of said County, purporting to convey to the said Dunlap the leasehold estate in a tract of land described in said lease as follows:

Beginning at an old steel shaft about 2" in diameter with an old bevel gear wheel on upper end, as a land mark stake set for the W. N.-W. corner of a 176 acre tract of land and the S. W. corner of the J. F. Rogers tract of land by the surveyor on the ground in the year 1899;

Thence northerly along the W. B. line of said J. F. Rogers tract of land to the N.-W. corner thereof on the N. B. line of the said headright survey a distance of about 880 yards;

Thence West 66.89 feet to the N.-E. corner of the Clark land which is also the N.-W. corner of the Alexander Rogers original tract of land prior to the junior surveys thereof made in the year 1899;

Thence Southerly 880 yards along the East boundary lines of the Clark land and the Haynes land, which is also the West boundary line of the said Alexander Rogers land, to a 1¼" iron pipe stake set in the West boundary line of the said Alexander Rogers tract of land, the same being the S.-W. corner of this tract;

Thence East 66.89 feet to the place of beginning and containing five (5) acres of land, more or less.

Save and except about 2 acres of land conveyed to J. W. Mings by Mrs. L. J. Rogers, et al, by deed dated May 7, 1917, and recorded in Volume 32, page 564, Deed Records of Gregg County, Texas.

27 In said lease, the lessors retained an oil payment of Twenty-five Hundred Dollars ($2500.00) per well, payable out of one-eighths of seventh-eighths (1/8 of 7/8) of the oil produced from said purported tract.

VI.

As hereinabove alleged, the tract of land described in said Dunlap lease was and is covered and included within the land covered by the leases of plaintiff, and said oil and gas lease to said Dunlap vested no right in or to the minerals in or on said land. Nevertheless, by the record of such oil and gas lease defendants have clouded the title to plaintiff's property, and have executed and recorded other instruments in writing further clouding such title, and have applied to the Honorable Railroad Commission of Texas for a permit to drill on such purported strip, and have heretofore threatened and are still threatening to enter thereon and drill a well for oil and gas, and have disturbed plaintiff in the quiet enjoyment of its title to and possession of such property, all to plaintiff's great and irreparable damage, for which plaintiff has no adequate remedy at law, being in possession of such property, and the damages being incapable of exact ascertainment.

Whereupon, plaintiff brings this suit and prays that upon hearing hereof it have judgment quieting its title to and possession of such property, removing the clouds cast upon its title by the record of the aforesaid oil and

gas lease and other instruments affecting the same, restraining the defendants from going upon such property or otherwise hindering or obstructing plaintiff in the use thereof and disturbing its enjoyment of its title and possession; that defendants be further restrained and enjoined from otherwise clouding the title to such property, and that the plaintiff recover its costs and general relief.

PHILLIPS, TRAMMELL, CHIZUM,
28 ESTES & EDWARDS,
HARRY O. COWING, JR.,
DAVID B. TRAMMELL,
Attorneys for Plaintiff.

Amended Bill of Complaint Filed January 11, 1936.

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29 ANSWER AND CROSS ACTION OF DEFENDANTS, B. P. DUNLAP, ET AL.

(Title Omitted.)

To the Honorable Court Aforesaid:

Come now the defendants, B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband, Azzie Waskom, and for answer to plaintiff's Amended Bill of Complaint show as follows unto the Court:

I.

The defendants, B. P. Dunlap, F. E. Rogers and W. H. Rogers say that the Amended Bill, as to them, should be dismissed for want of equity, for that:

(a) It appears from the face of the Amended Bill that the plaintiff relies upon what is called a confirmation

oil and gas lease, dated May 8, 1931, recorded in Vol. 84, page 516, of the deed records of Gregg County, Texas, wherein the land covered and included in the original lease was described by specific field notes, and to which confirmation lease these named defendants were not parties; neither were they parties to the original lease; and the plaintiff, claiming only an oil, gas and mineral leasehold estate in and under said confirmation lease (or under the land covered by the original lease), could not obtain possession thereof except by reducing same to actual and physical possession by development and production of oil and gas from the land; and these defendants show that there has never been any development on the land now involved or covered by the lease now sought to be canceled as a cloud, for which reason plaintiff is not (and has not been) in possession of said strip of land or the mineral leasehold estate; and without possession it is not entitled to maintain a suit in equity, but has an adequate remedy at law in form of trespass to try title.

(b) All royalty owners under the J. F. Rogers tract are necessary and indispensable parties, as well as all royalty owners under the strip of land in controversy, as well all owners of miners or fee simple estate in the land lying between the Haynes tract, to the west, and the J. F. Rogers tract, to the east, including Sun Oil Company, The Texas Company, B. F. Phillips, A. O. Phillips, L. F. Burke, for that it has been established that the Haynes land, to the west, does not adjoin the J. F. Rogers tract, but that a strip of land lies immediately east of the Haynes land, which is not a part of the J. F. Rogers tract.

(c) A suit in equity is not maintainable until the plaintiff shall have established its legal title by an action at law, and since the bill shows that plaintiff is seeking, in this equity action, to recover both title and possession of the property, the bill should be dismissed.

31 II.

The defendants, Mrs. L. J. Rogers, J. E. Rogers and wife, Ola Mae Rogers, and Elvie Waskom and husband, Azzie Waskom, adopt the foregoing allegations as shown in paragraph I hereof, and in addition show that the plaintiff has never been in possession of the strip of land covered by the Dunlap lease.

III.

For answer, if same be necessary, the defendants show that they do not have sufficient knowledge of the facts with respect to the residences of all defendants to either admit or deny the allegations of fact contained in paragraph I of the Amended Bill.

IV.

These defendants admit that such a deed was executed along with other deeds of partition, as stated in the first part of paragraph II of the Amended Bill, but deny that "at the time same was executed the Wiley Davis northeast corner was a well-established corner, located and established on the ground, and a road had been established along such common line running southward to and across the public road and along the line between the Bozeman (now Haynes) east line and the Rogers west line south of the road." They say that if it be determined that at such time, in 1899, the Wiley Davis northeast corner was well located on the ground, yet when the various partition deeds were in process of being prepared and executed the parties to the partition; prior to the writing of the deeds, had a surveyor to run the north line of the tract mentioned in the deed of Feb. 28, 1899, recorded in Vol. R, at page 59, and said line was on the ground at the time actually run from the N. E.
32 corner of the Thomason Survey, west 880 yds., being 440 yards west of the N. W. corner of

W. H. Rogers tract No. 1 of such partition, and that the surveyor on the ground stopped at such point and made corner on the ground; that it was known then that such point was not a common point with any adjoining land, especially any land owned by Wiley Davis, but, to the contrary, the surveyor stopped and fixed the corner at 880 yards, as aforesaid, at the direction of the owners of the land then under partition, and the call from such point was South 880 yards, thence East 224, etc., as shown in the deed. And if the deed in fact now calls for the Wiley Davis corner, the same is called for by mistake, and the surveyor actually on the ground did not run the line to such corner, if the said corner was other than at 880 yards west of the northwest corner of the Thomason Survey. These defendants deny that such deed was intended to or did convey to J. F. Rogers the tract of land joining the Wiley Davis tract at its northeast corner and running south with such Davis tract and the west line of the tract now owned by J. M. Haynes to the southwest corner of said J. F. Rogers tract. In this connection, defendants show that in connection with such partition, J. F. Rogers never went into possession of any land west of a line south of the corner 880 yards west of the northeast corner of the Thomason Survey, and there was never any segregation of possession as to any land of the original common tract, west of such line south from such point 880 yards west of the northeast corner of the said Thomason Survey; and the
33 title and possession of such land remained in all the said original owners of the common tract, to-wit: J. W. Rogers, W. H. Rogers and F. E. Rogers and J. F. Rogers. The said deed of February 28, 1899, is not a deed of conveyance but is simply a partition deed and conveys no title whatsoever.

V.

These defendants admit the execution of the deed mentioned in paragraph III of the Amended Bill. They say

that the northwest corner of the said two-acre tract at 953 vrs. west of the northeast corner of said Thomason Survey is 3 varas west of the point 880 yards west of said northeast corner. Also that the defendants other than those executing said deed could under no circumstances be bound or prejudiced by the execution of said deed. The defendants each and all deny the allegations of the Amended Bill contained in paragraph III, page 4, beginning with the sentence, "On the date of October 20, 1930", etc.

VI.

The defendants deny the allegations of paragraph IV of the Amended Bill, especially the allegations that plaintiff immediately went into possession. Also the defendants deny that in confirmation of the original lease the lessors executed a ratification covering other or additional land, or intended to cover or include other or additional land; but, to the contrary, show that at the time the ratification lease was presented to lessors and executed by them, plaintiff, through its agent who presented said ratification lease, represented to lessors that it was but a ratification of the original lease, direct to plain-
34 tiff, and that the only change was to change the calls from yards to feet, and that no additional land was included therein. The lessors, relying upon such statement and having no means of knowing that other and additional land was included, signed the same. Lessors were not surveyors, or versed in land field notes, and did not know that the calls were materially changed, though plaintiff did know that fact and had surveyed the land and had found the original lease did not cover the land now in controversy (or land on the east side and south side of the 66-acre tract), and knowing such fact fraudulently represented to lessors that the change was simply from yards to feet. Furthermore, plaintiff did not pay anything whatsoever to lessors, and said confirmation was and is wholly without consideration.

Plaintiff has not developed for oil and gas the additional land so fraudulently included, and has in nowise changed its position on account thereof. Defendants deny any intention to include in said ratification lease any additional land than originally leased.

VII.

Defendants admit the allegations of paragraph V of the Amended Bill, save they say said lease is a good and valid lease. If mistaken that said lease is good and valid as to all said named lessors, it is good and valid as to an undivided interest of F. E. Rogers and W. H. Rogers. Also they show that at the time (or immediately thereafter) the partition of 1899 was made, the old steel shaft, about 2" in diameter with an old bevel gear wheel on upper end was set and driven in the ground by one of the said original Rogers and in the presence and with the knowledge of the others, as a land marker of the west northwest corner of the said original 176-acre tract, and was then and thereafter recognized as such by each and all said parties. Said marker was on the ground when
35 plaintiff took its lease, and the fence line was at and near said marker, and same has been recognized and acquiesced in as such marker for more than thirty-five years.

VIII.

Defendants deny that plaintiffs' lease covers and includes the land described in the Dunlap lease, as alleged by plaintiff in paragraph VI of the Amended Bill. They deny that they have clouded plaintiff's lease in any respect, and deny that plaintiff has title to the land covered by the Dunlap lease, or that plaintiff is or has ever been in possession of said land.

IX.

Defendants show that in 1899, when the partition was being effected, the north line of the 66-acre tract was run on the ground by the surveyor, and that same was run on the ground by the surveyor starting at the northeast corner of Lot No. 2, the northwest corner of Lot No. 1, W. H. Rogers tract, then ran west 440 yards and fixed corner; that the surveyor did not go on the ground further west than 440 yards, but stopped on the ground at 440 yards and staked corner; that the west line south was not run or the ground or any other of the lines, but same were calculated. That the deed was not then immediately prepared, but when prepared if the call for Wiley Davis corner is in the deed same was put in by inadvertence and mistake, and the line as actually surveyed on the ground did not go to the Wiley Davis corner, if said corner was or is any other place than 440 yards west of said northwest corner of Block No. 1. Said Wiley Davis corner was not fixed or located or
36 susceptible of definite ascertainment at the time, in 1899, and has not been capable of definite ascertainment since said time, and, being incapable of definite ascertainment, the call for west 440 yards controls.

X.

Defendants further show that in 1899, when the said north line was actually surveyed on the ground, the line was stopped at 440 yards west of the northwest corner of Lot No. 1, purposely and so that the original Rogers owners could at all times have an outlet from the north to the main public road leading from Gladewater and the west, to Longview, the County site, and to the east on to Shreveport, Louisiana; said public road being some half mile south of the north end of the Rogers 176-acre tract. The Rogers family were hauling logs and timber

from the north of said 176-acre tract and other land to the north, and purposely left a strip on the west side unpartitioned, so that at all times they would have an open outlet, as aforesaid; and there was no intention to include said strip in said 66-acre tract or to partition same in any respect. And there was no intention to include it in the ratification lease now claimed by plaintiff.

XI.

Defendants further aver that at the time the partition was made of the Rogers land referred to in plaintiff's bill and also in this answer, the Rogers family, desiring to leave a strip on the west side for an open roadway, had said land surveyed, as above alleged, to begin at the northeast corner of the Survey, thence to run west 880 yards, for Lots Nos. 1 and 2; thence South 880 yards to a corner marked by an old gear wheel, which gear wheel is now standing in the ground and marks the
37 corner of said land partitioned; thence ran east 224 varas to corner. At this corner, there was a fence running in a northeasterly direction. The call then being, thence North 310 yards, at 12 deg. east of north; thence East 754 yards to W. H. Rogers' line, which these defendants aver was a well-established line and marked on the ground at that time; thence North 572 yards to the starting point, which was a well-marked starting point, 440 yards west of the northeast corner of the G. A. Thomason Headright Survey—the northwest corner, as established on the ground, and the southwest corner, as established on the ground, being established at a point 68 feet east of the line claimed by the plaintiff in plaintiff's amended bill of complaint, this being left out by the surveyor at the request of the Rogers family for a road, to be jointly owned and controlled by the parties to the said partition. And in this connection, defendants aver that if you take the northwest corner, as claimed by the plaintiff in plaintiff's amended bill of complaint and run

a line south, then run east 224 yards, as called for in the deeds, you will lack 68 feet of going to the old fence line, and you either leave 68 feet out of the partitioned land, on the southwest side, or 68 feet on the east side, as claimed by these defendants. For, if you run from the southwest point, as claimed by the plaintiff, east 224 yards, there will be 68 feet between the fence and the call distance; thence north 310 yards, at 12 deg. east of north, and there will be 68 feet between the line and the old fence; thence north 754 yards to W. H. Rogers' line, and there will be 68 feet, or approximately that amount, between the actual southern boundary, as established by the survey, and the actual southern boundary as claimed by these defendants. So the defendants either own the land which they claim, from a point 880 varas
38 west of the northeast corner of the G. A. Thomason Survey to the west line of the Rogers land, as originally established on the ground, or they own the land on the southeast portion, from a point 224 yards east of any southwest corner which may be established by the Court, and they are entitled to have set aside to them this land not included in the partition, either on the west or on the southeast.

XII.

Answering further, the defendants further aver that if plaintiff's contention is true in this case, then the Rogers family was conveying land which it never owned, and the plaintiff, in its amended bill of complaint, is claiming land which was never included in the Rogers title. And in this connection, these defendants aver that the Rogers tract of land constituted the northeast one-quarter of the Survey and could not have covered the land claimed by plaintiff. The defendant B. P. Dunlap owns both the Rogers' title and the Moseley title to the particular land claimed herein by the plaintiff. In other words, he has the title under the heirs of the Rogers

family, and also has the title under Augustus Moseley, and in any event the plaintiff could not have title to the tract of land claimed by plaintiff.

Wherefore, having fully answered, defendants pray that the amended bill of complaint be dismissed, and, in the alternative, they pray that if lessors in the original lease and ratification, as claimed by the plaintiff, be bound thereby, and that said strip be held to be included therein, then that the other defendants, B. P. Dunlap and the other members of the Rogers family not
39 signing said ratification be adjudged to own an undivided interest therein, and that their undivided interest therein be recognized and established and that the same be partitioned and set off to them, as the same is susceptible of partition in kind.

W. A. WADE,
ANGUS G. WYNNE,
Attorneys for Defendants.

XIII.

And now come said defendants and, becoming actors herein, without waiving their motion to dismiss and only subject to the said motion to dismiss, aver that the so-called ratification referred to by the plaintiff as having been dated on October 20, 1930, and signed by L. J. Rogers, J. E. Rogers, A. S. Waskom and his wife, Elvie Waskom, and the other lease which plaintiff claims as dated May 8, 1931, recorded in Vol. 84, page 516, should not in equity cover any part of the land claimed by the defendant B. P. Dunlap herein, for L. J. Rogers, J. E. Rogers and A. S. Waskom and his wife, Elvie Waskom, did not own any interest in the tract of land claimed by B. P. Dunlap save and except an undivided interest therein. They leased in good faith to W. P. Chandler the land described in the lease dated October 20, 1930, which did not include the land now claimed by plaintiff and owned by B. P. Dunlap; but in 1931, the said land having become very valuable for mineral purposes, the

plaintiff, Empire Gas & Fuel Company, sent its
40 agent to see J. E. Rogers, L. J. Rogers and the Waskom owners, and represented to them that the old lease which had been signed to Chandler was written out in varas and that they desired to have the lease set out in fact; that the ratification which they desired to have signed did not include any more land than the first lease which they had given them, and that they were not paying them any consideration for the ratification because the same was not taking in more of their land than actually was included in the metes-and-bounds description of the first lease, dated in October, 1930, and given to the said Chandler, and as referred to by plaintiff. The said J. F. Rogers, J. E. Rogers and the Waskoms, being unacquainted with field notes, relied upon the statement made by the said Cox and Patterson, the representatives of the Empire Gas & Fuel Company, and signed said instrument to ratify the former lease, and to change the field notes from varas to feet, but without any intent of leasing any more of their land and without knowledge that they had leased any more of their land. Therefore, the said plaintiff cannot take advantage of its own wrong and fraud, and the said ratification lease should be in all things canceled by a judgment of this Court, and the said J. E. Rogers, J. F. Rogers and B. P. Dunlap here and now file their cross-action, joined in by the Waskoms and, subject to their motion ot dismiss, pray the Court that in the judgment which should be entered herein said ratification be in all things canceled.

And, continuing as actors herein, said defendant B. P. Dunlap and the other defendants herein aver and allege to the Court that the tract of land claimed by plaintiff and described by plaintiff, and as described in the lease of B. P. Dunlap, is by metes and bounds as follows:

41 Beginning at an old steel shaft about 2" in diameter with an old bevel gear wheel on upper

end, as a land mark stake set for the W. N.-W. corner of a 176 acre tract of land and the S.-W. of the J. F. Rogers tract of land by the surveyor on the ground in the year 1899;

Thence Northerly along the W. B. line of said J. F. Rogers tract of land to the N.-W. corner thereof on the N. B. line of the said headright survey a distance of about 880 yards;

Thence West 66.89 feet to the N.E. corner of the Clark land which is also the N.-W. corner of the Alexander Rogers original tract of land prior to the junior surveys thereof made in the year 1899;

Thence Southerly 880 yards along the East boundary lines of the Clark land and the Haynes land, which is also the West boundary line of the said Alexander Rogers land, to a 1¼" iron pipe stake set in the West boundary line of the said Alexander Rogers tract of land, the same being the S.-W. corner of this tract;

Thence East 66.89 feet to the place of beginning and containing five (5) acres of land, more or less.

Save and except about 2 acres of land conveyed to J. W. Mings by Mrs. L. J. Rogers, et al, by deed dated May 7, 1917, and recorded in Volume 32, page 564, Deed Records of Gregg County, Texas.

This land is fully covered by the lease of B. P. Dunlap from F. E. Rogers, W. H. Rogers and others, as shown by lease of record in Volume 170, page 602, of the Deed Records of Gregg County, Texas. Further, the said B. P. Dunlap, by virtue of a line agreement with B. F. Phillips, L. F. Burke and others, owning the land west of the above-described land, owns all of the title held by the Rogers family to this strip and all of the title held by

the Moseley family to this land, and in any event he is the owner of an undivided interest in said land with the said Empire Gas & Fuel Company, should the Court hold that the ratification lease signed by J. E. Rogers, J. F. Rogers and the Waskoms is a valid and subsisting lease and ratification. And, in the alternative, this defendant, B. P. Dunlap, would be entitled to a partition
42 thereof with the plaintiff, Empire Gas & Fuel Company. However, should this Honorable Court determine that the line of the Empire Gas & Fuel Company on the west would include defendant's lease, then the defendants, B. P. Dunlap and F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, J. E. Rogers and wife, Ola Rogers, Elvie Waskom and A. S. Waskom, allege and aver that that portion of the land claimed by the Empire Gas & Fuel Company beginning at a point 224 varas east of any southwest corner which may be determined by the Court; thence north 310 yards at 12 deg. east of north; thence east 154 yards to the W. H. Rogers line; thence south with W. H. Rogers' line to the north line of the King tract; thence west 154 yards to corner; thence south 12 deg. west of south 310 yards to corner; thence west 68 yards to beginning is in no way covered by the lease of the Empire Gas & Fuel Company, at all. In other words, the Empire Gas & Fuel Company cannot extend its line on the west and at the same time hold this land on the east because its lease either does not cover the land on the west or it does not cover the land on the east, and these defendants aver and allege, by way of cross-action, that if the Court determine that the southwest corner of the Empire Gas & Fuel Company lease is at the southwest corner of the B. P. Dunlap lease, as described by plaintiff and as above described, then defendants aver that all of the land lying east of a point 224 varas west of said corner is in no way covered by the lease of the Empire Gas & Fuel Company, and these defendants would be entitled to have the judgment of the Court establishing said southeast corner of the Empire Gas &

Fuel Company lease and establishing the other corners of said lease on the south line thereof.

The defendant B. P. Dunlap is the owner of
43 on oil, gas and mineral lease from J. E. Rogers, A. S. Waskom and all of the other heirs and owners of the Rogers land covering the land on the southeast of the Empire lease, as above described, and in all equity, if the Empire Gas & Fuel Company is permitted to take their lease away from them on the west, he is entitled to be protected and to have his lease established on the southeast, and to have any claim or claims of the said Empire Gas & Fuel Company canceled as to his said oil, gas and mineral lease.

Defendants B. P. Dunlap, F. E. Rogers, L. J. Rogers, J. E. Rogers, Elvie Rogers Waskom and A. S. Waskom further aver to the Court that the real beginning corner of the lease of the plaintiff, as given to it by L. J. Rogers, J. E. Rogers and A. S. Waskom and wife, Elvie Waskom, was 440 yards east of the northeast corner of said Thomason Survey, but in the so-called ratification the said beginning corner is about 60 feet east of the actual beginning corner. In other words, instead of beginning at 440 yards from the northeast corner of the Thomason Survey, and which was the northwest corner of Tract No. 1 of the subdivision as made by the Rogers family, the Empire Gas & Fuel Company, by its present field notes and claims, seeks to claim the land on the west and abandon the land on the east; so these defendants allege and charge that they are entitled to have the boundary lines of the said lease established, once and for all, where they should be. They aver that the beginning corner of said lease should be at a point 440 yards east of the northeast corner of the Thomason Survey; thence to run west 440 yards for corner; thence south to corner at the old gear wheel; thence east 224 yards to corner; thence
44 north 310 yards at 12 deg. east of north; thence east 154 yards to W. H. Rogers line; thence

north 572 yards to the starting point, which gives to the complainant all of the land which was ever covered by its lease; but should the Court find and determine that the ratification lease should control, then these defendants aver that they are entitled to have the northeast corner of the lease of the Empire established 1228 feet east of the northeast corner of the 2-acre tract and to have the southeast corner established 224 yards east of the southwest corner, as may be found by the Court, and they pray, as cross-complainants that they have judgment so establishing the corners of the Empire Gas & Fuel Company lease, either by the ratification or by the original lease, whichever one is fair, just and right, and that there be partitioned off to B. P. Dunlap and those other defendants who did not sign either of the leases to the Empire Gas & Fuel Company such portions of such lease as may to the Court seem just and right.

Wherefore, the defendants B. P. Dunlap and others, without waiving the motion to dismiss and their answer to the claims of the Empire Gas & Fuel Company in its amended bill, and in the alternative, becoming actors and cross-complainants, pray the Court that all claims of the said Empire Gas & Fuel Company to the tracts of land described in the lease from W. H. Rogers and others to B. P. Dunlap, of record in Volume 170, page 602, of the deed records of Gregg County, and above re-
45 ferred to, be canceled; that the so-called ratification lease signed by J. E. Rogers and others, and above referred to, dated in May, 1931, be canceled. But if the Court should hold that the said so-called ratification lease is binding on the said A. S. Waskom, J. F. Rogers and the other signers thereto, then that the said lease be partitioned and that the interest of the said B. P. Dunlap and those under whom he claims who did not sign the said so-called ratification lease be set aside and partitioned to them; and in the further alternative, should the Court hold that the said B. P. Dunlap and the other

defendants are not entitled to any relief with regard to the land on the west, then that the Court determine the boundaries of the Empire Gas & Fuel Company lease at the northeast corner, the south and east and that they be established at a point 224 feet east of any southwest corner established by the Court, and that the northeast corner be established either at a point 440 yards east of the northeast corner of the Thomason Survey or at a point 68 feet west of a point 440 yards east of the northeast corner of said survey, and that from said beginning corner said B. P. Dunlap have set aside to him his oil, gas and mineral lease covering the land described therein and as above described; that defendants have partition of said lease, together with such other and further relief to which these defendants, as cross-complainants, may be entitled, in an equitable trial as to their rights.

(Signed) W. A. WADE,
(Signed) ANGUS G. WYNNE,
Attorneys for Defendants and Cross-Plaintiffs.

Answer and Cross-Action of Defendants B. P. Dunlap, et al. Filed January 27, 1936.

REPLICATION TO THE ANSWER AND CROSS ACTION OF DEFENDANTS.

46 (Title Omitted.)

To the Honorable Court:

Your Complainant files this Replication to the Answer and Cross-Action of Defendants B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie Rogers Waskom and husband, Azzie Waskom, and says:

I.

Your Complainant denies that part of paragraph IV wherein it is alleged that when the partition deed was in

process of being executed the parties thereto had a surveyor run the North line of the tract mentioned in the deed of February 28, 1899, and he stopped on the ground said North line and established a corner at a distance of 880 yards West of the Northeast corner of the Thomason Survey. Complainant further denies the allegations of said paragraph that the call in the deed for the Wiley Davis Northeast corner was made by mistake and denies the allegation that the surveyor did not actually run the line to said corner. It further denies the allegations that J. F. Rogers never went into possession of any land West of a line South of a corner 880 yards West of the Northeast corner of the Thomason Survey, and in this connection alleges that the said J. F. Rogers did actually go into possession of the land West of the corner 880 yards West of the Northeast corner of the Thomason Survey and went into possession of all the land between the Northeast corner of the Thomason Survey and the Wiley Davis tract.

47 II.

Complainant denies that part of paragraph VI wherein defendants allege that at the time the ratification lease was presented to the lessors, Complainant represented that the only change was in the calls from yards to feet. Complainant specially denies that it fraudulently represented to the lessors that the only change was from yards to feet.

III.

Complainant denies the allegations in paragraph VII that the old bevel gear was driven in the ground by one of the Rogers as a land marker for the Northwest corner of the 176 acre tract and denies the allegations that said bevel gear has been recognized as a corner.

IV.

Answering paragraph IX, Complainant denies that, when the partition was made, the Surveyor stopped the line on the ground at 440 yards West of the Northeast corner of Lot No. 2 and fixed said corner with a stake. It denies that the call for the Wiley Davis corner was placed in the deed through inadvertence and mistake and it denies that the line actually surveyed on the ground did not go to the Wiley Davis corner. Complainant further denies that the Wiley Davis corner was not fixed or located or susceptible of definite ascertainment at the time of the partition in 1899 and it denies that said corner has not been capable of definite ascertainment since said time. Complainant avers that it and its predecessors in title purchased in good faith, paying a valuable consideration therefor, the oil and gas lease which it now owns and holds, relying upon the call in the deed and oil and gas lease for the Wiley Davis Northeast corner as marking and fixing the Northwest corner of the tract of land conveyed by J. W. Rogers and others to F. E. Rogers, and without any knowledge or notice of the claims now asserted by defendants to the strip of land described in the purported oil and gas lease from F. E. Rogers,
48 et al, to B. P. Dunlap and without any notice or knowledge that the call for the Wiley Davis Northeast corner was inserted by mistake in the deeds and oil and gas lease (if such call was inserted through mistake, which Complainant does not admit but denies).

V.

Answering paragraph X, Complainant denies that, when tract No. 2 was surveyed, the Northwest corner was stopped at a point 440 yards West of the Northwest corner of tract No. 2 but, in this connection, says that if the said line was stopped and a strip of land was left for a road, title to said strip passed to J. F. Rogers subject to the easement.

VI.

Answering paragraph XI, Complainant denies that the Northwest corner of tract No. 2 was fixed on the ground at a point 880 yards West of the Northeast corner of the Thomason Survey and specially denies that a stake or old gear wheel was driven in the ground by the Surveyor to mark the Southwest corner of Tract No. 2. In this connection, Complainant says that, if a strip was left out of the field notes for the purpose of a road, the fee simple title to said strip passed to J. F. Rogers, subject to the easement. Complainant denies that defendants own either a strip of land on the West side of Complainant's lease, not covered by the description in Complainant's said lease, or a strip of land on the East side of its lease.

VII.

Answering paragraph XII, Complainant denies that the Rogers family never owned the East one-half of the Thomason Survey.

VIII.

Complainant, answering the cross-action and the allegations contained in paragraph XIII of defendants' answer and cross-action, moves to strike said cross-action and dismiss same for the following reasons:

(a) The allegations contained in the cross action are insufficient in equity to state any cause of action against Complainant;

(b) The allegations are vague, uncertain and indefinite and do not apprise Complainant of what the said defendants expect to prove thereby;

49 (c) The allegations contained in said cross-action are repugnant, conflicting, and mutually

destroy each other, and are in the alternative contrary to the Rules of Equity.

(d) Said allegations are argumentative and conclusions of law and no specific fact is stated showing that, in equity, said defendants are entitled to the relief for which they pray;

(e) The said allegations are insufficient in equity to allege or prove that the defendants ever owned title to the said land involved in said cross-action.

IX.

Complainant, answering the cross-action of said defendants, denies all the allegations of paragraph XIII, except such allegations as are hereinafter specially admitted. Complainant admits that Mrs. L. J. Rogers, J. E. Rogers, A. S. Waskom and wife, Elvie Waskom, executed the oil and gas lease to W. P. Chandler, but they deny the allegations that said lease did not include the strip of land heretofore described in its amended bill of complaint. It denies the allegations that it and its agents perpetrated fraud upon the said J. F. Rogers, J. E. Rogers and A. S. Waskom and wife, Elvie Waskom, in securing the correction and ratification deeds. In this connection it says that the original lease executed to W. P. Chandler did cover and include all the land included in the correction and ratification lease. Complainant denies that the said B. P. Dunlap owns any title to the tract of land fully described by metes and bounds in paragraph XIII of said answer and cross-action and it denies that the defendants own a strip of land along the East side of the land Complainant has under lease, which was not covered and included in the oil and gas leases to Complainant. Complainant denies the allegation that the real beginning corner of the lease to W. P. Chandler, which title Complainant now holds, was 440 yards West of the North-

east corner of the said Thomason Survey, and in this connection alleges that the beginning corner, being the Northeast corner of Tract No. 2, as actually located on the ground, was 451 yards West of the Northeast corner of the Thomason Survey, and it denies that the beginning corner in the ratfication lease is 60 feet East of the beginning corner in the original lease. Complainant denies that the boundaries of its lease should be established according to the course and distance calls contained in said answer and cross-action and, in this connection, says that it has a lease upon all of the land that its lessors owned in the Thomason Survey and its lessors, at the time they executed the leases, owned all of the land herein sued for by Complainant, and owned at said time all the land herein sued for by defendants in their cross-action.

X.

Complainant denies each and every allegation contained in the defendants' cross-action, except such allegations as are specially admitted herein.

Wherefore, Complainant prays that its title to the land herein sued for be quieted and the cloud removed and that the defendants take nothing by their cross-action.

H. J. PATTERSON,
PHILLIPS, TRAMMELL, ESTES,
EDWARDS & ORN,
CLAYTON L. ORN,
Attorneys for Complainant.

Replication to the Answer and Cross-Action of Defendants. Filed as of April 27, 1936.

JOINT MOTION OF EMPIRE GAS & FUEL COMPANY, ET AL, TO SUBSTITUTE EMPIRE OIL & REFINING COMPANY AS COMPLAINANT.

51 (Title Omitted.)

Comes now Complainant, Empire Gas & Fuel Company, and Empire Oil & Refining Company and respectfully represents to the Honorable Court the following facts:

I.

Complainant, Empire Gas & Fuel Company, is a private corporation incorporated under the laws of the State of Maine. Empire Oil & Refining Company is a private corporation incorporated under the laws of the State of Delaware and is a citizen, resident and inhabitant of such State and has a permit to do business in the State of Texas.

II.

At the time Complainant, Empire Gas & Fuel Company, filed the Bill of Complaint herein, all of its stock except the Directors' qualifying shares was owned by the Empire Oil & Refining Company. On or about the 31st day of March, 1936, Complainant, Empire Gas & Fuel Company, made, executed and delivered to Empire Oil & Refining Company deeds, assignments and transfers, conveying, assigning and transferring to Empire Oil & Refining Company all the right, title and interest of the Empire Gas & Fuel Company in and to the oil and gas leasehold estate involved in this controversy, thereby conveying to Empire Oil & Refining Company all of the right, title and interest of the Empire Gas & Fuel Company in and to the oil and gas lease executed by Mrs. L. J. Rogers, et al, to W. P. Chandler, Lessee, on October

20, 1930, and recorded in Volume 61, page 295 Deed Records of Gregg County, Texas, and the correction oil and gas lease executed by Mrs. L. J. Rogers and
52 others to Empire Gas & Fuel Company, Lessee, on May 8, 1931, and recorded in Volume 84, page 516 Deed Records of Gregg County, Texas.

Wherefore, Complainant and Empire Oil & Refining Company pray that the Honorable Court substitute Empire Oil & Refining Company as Complainant in this action in lieu of Empire Gas & Fuel Company.

H. J. PATTERSON,
PHILLIPS, TRAMMELL, ESTES, EDWARDS & ORN,
Attorneys for Empire Gas & Fuel Company and Empire Oil & Refining Co.

Joint Motion of Empire Gas & Fuel Company, et al, to Substitute Empire Oil & Refining Company as Complainant. Filed as of April 27, 1936.

ORDER SUBSTITUTING EMPIRE OIL & REFINING COMPANY AS COMPLAINANT.

53 (Title Omitted.)

Order.

On the 27th day of April, 1936, came Complainant, Empire Gas & Fuel Company and Substitute Complainant, Empire Oil & Refining Company, and filed their joint motion herein to substitute Empire Oil & Refining Company as Complainant in this action in lieu of and in place of Empire Gas & Fuel Company; and it appearing to the Court from the evidence and agreement of the parties

hereto that Empire Oil & Refining Company, at the time this action was instituted, owned all the stock of the Empire Gas & Fuel Company, Complainant herein, except the qualifying shares; that on or about March 31, 1936, Empire Oil & Refining Company, the parent corporation, acquired the assets of the Empire Gas & Fuel Company situated in the State of Texas; that on said day and date Empire Gas & Fuel Company made, executed and delivered to Empire Oil & Refining Company certain deeds, assignments and transfers, assigning, transferring and conveying to Empire Oil & Refining Company all the right, title and interest of Empire Gas & Fuel Company in and to the real property described in the oil and gas lease executed by Mrs. L. J. Rogers, a widow, and others, to W. P. Chandler, Lessee, on October 20, 1930, and recorded in Volume 61, page 295 Deed Records of Gregg County, Texas, and the correction oil and gas lease executed by Mrs. L. J. Rogers and others to Empire Gas & Fuel Company, Lessee, on May 8, 1931, and recorded in Volume 84, page 516 Deed Records Gregg County, Texas; that under the provisions of said transfer and assignment Empire Oil & Refining Company succeeded to and acquired the title, if valid, of the Empire Gas & Fuel Company to the oil and gas leasehold estate on the strip of land involved in this controversy; that the Empire Oil & Refining Company is incorporated under the laws of the State of Delaware and has a permit to do business in Texas, and is a citizen, resident and inhabitant of said State of Delaware, and there exists a
54 diversity of citizenship between said substituted complainant, Empire Oil & Refining Company, and defendants.

It is therefore Ordered that Empire Oil & Refining Company be, and it is hereby, substituted as complainant in this action and said action shall proceed in the name of Empire Oil & Refining Company.

It further appearing to the Court that the Empire Gas & Fuel Company, prior to the trial of said cause, transferred to Empire Oil & Refining Company whatever right, claim, title and interest it had in and to the land and premises involved in said action;

It is therefore Ordered that the said Empire Gas & Fuel Company be and it is hereby dismissed as complainant in this cause of action, and this action shall be continued in the name of Empire Oil & Refining Company, as fully as if this action had originally been brought by Empire Oil & Refining Company.

Entered at Sherman, Texas, this the 30 day of April, A. D. 1938.

RANDOLPH BRYANT,
Judge.

Filed May 2, 1938.

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55 DECREE.

In the District Court of the United States, for the Eastern District of Texas, Tyler Division.

Empire Gas & Fuel Company
vs. No. 803 Equity.
B. P. Dunlap, et al.

This cause came on to be heard on the 27th day of April, A. D. 1936, at a regular term of this Court and came Complainant, Empire Oil & Refining Company, and announced ready for trial, and came the defendants, B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, and Elvie (Rogers) Waskom and husband, Azzie Waskom, and pre-

sented their motion to dismiss the bill of complaint filed herein by Complainant, on January 11, 1936, and the Court having considered said motion, was of the opinion that it was not well taken and should be denied;

It is therefore Ordered that said defendants' motion to dismiss the bill of complaint be and the same is hereby denied, to which action and ruling of the Court defendants duly excepted; thereupon came Complainant, Empire Oil & Refining Company, and presented its motion to dismiss the cross-action filed by defendants, B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, and Elvie (Rogers) Waskom and husband, Azzie Waskom, and the Court having considered said motion was of the opinion that it was not well taken and should be denied;

It is therefore Ordered that Complainant's motion to dismiss the cross-action of said defendants be and the same is hereby denied;

And thereupon the Complainant and defendants announced ready for trial, and said cause was tried from day to day. At the conclusion of the evidence, the
56 Court announced that the case would be taken under advisement and no decree would be rendered and entered until Complainant and defendants had an opportunity of presenting to the Court their request for findings of fact and conclusions of law; thereupon the Court took said cause under advisement from term to term, pending the submission by counsel for Complainant and Respondents of their requested findings of fact and conclusions of law, and authorities thereon;

The Court, after considering the requested findings of fact and conclusions of law submitted by counsel for Complainant and Respondents and having heard argument of counsel, is of the opinion that the following

decree should be entered and said decree is, on the 30th day of April, A. D. 1938, entered as a decree of this Court:

(1) It Is Ordered, Adjudged and Decreed by the Court that Empire Oil & Refining Company is hereby substituted as Complainant in this action, in place of and in lieu of Empire Gas & Fuel Company, the Empire Oil & Refining Company and Empire Gas & Fuel Company having made motion for substitution of said Empire Oil & Refining Company as Complainant during the trial of this cause:

(2) It Is Ordered, Adjudged and Decreed by the Court that Complainant, Empire Oil & Refining Company, a corporation, does not own, hold or have any right, title or interest in or to the oil, gas and mineral leasehold estate and the minerals on, in and under the following described tract of land, to-wit:

Being all that certain lot, tract and parcel of land in Gregg County, State of Texas, in the Geo. A. Thomason Headright Survey, lying West of the West boundary line of the J. F. Rogers tract of land as surveyed in the year 1899, and East of the West boundary line of the Alexander Rogers tract of land established in or about the year 1855, which line is also the East boundary line of the G. W. Clark and M. P. Haynes tract of land, this lot, tract and parcel of land being more particularly described as follows, to-wit:

Beginning at an old steel shaft about 2" in diameter with an old bevel gear wheel on upper end, as a land mark stake set for the W. N.-W. corner of a 176 acre tract of land and the S.-W. corner of the J. F. Rogers tract of land by the surveyor on the ground in the year 1899;

Thence Northerly along the W. B. line of said J. F. Rogers tract of land to the N.-W. corner thereof on the

N. B. line of the said headright survey a distance of about 880 yards;

57 Thence West 66.89 feet to the N.E. corner of the Clark land which is also the N.-W. corner of the Alexander Rogers original tract of land prior to the junior surveys thereof made in the year of 1899;

Thence Southerly 880 yards along the East boundary lines of the Clark land and the Haynes land, which is also the West boundary line of the said Alexander Rogers land, to a 1¼" iron pipe stake set in the West boundary line of the said Alexander Rogers tract of land, the same being the S.-W. corner of this tract;

Thence east 66.89 feet to the place of beginning and containing five (5) acres of land, more or less.

Save and except about 2 acres of land conveyed to J. W. Mings by Mrs. L. J. Rogers, et al, by deed dated May 7, 1917, and recorded in Vol. 32, page 564, Deed Records of Gregg County, Texas.

It is therefore Ordered, Adjudged and Decreed by the Court that Complainant, Empire Oil & Refining Company, a corporation, have of and take nothing from the defendants, B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband, Azzie Waskom, Curtis M. Willock and J. B. Parker insofar as Complainant seeks to quiet its title to the oil and gas leasehold estate and minerals on, in and under the tract of land above described.

(3) It is further Ordered, Adjudged and Decreed by the Court that defendant, B. P. Dunlap, owns, has and holds the title to the oil and gas leasehold estate and 7/8ths of the minerals on, in and under the tract of land

above described in paragraph (2) hereof, subject to the terms and provisions of that certain oil and gas lease executed by F. E. Rogers and others to B. P. Dunlap, dated October 10, 1934, and recorded in Volume 170, page 602, et seq., Deed Records of Gregg County, Texas.

(4) It is further Ordered, Adjudged and Decreed by the Court that Complainant, Empire Oil & Refining Company, owns, has and holds an oil and gas lease and mineral leasehold estate and 7/8ths of the minerals on, in and under the following described tract of land situated in Gregg County, Texas, to-wit:

Being a part of the G. A. Thomas H. R. starting at the NE cor. of Lot No. 2, which is the NW cor. of W. H. Rogers Tract Lot No. 1 running West 440 yards; thence S. 880 yards; thence East 224 yards; thence North 310 yards at 12° East of North; thence East 754 yards to W. H. Rogers line; thence North 572 yards to starting point, containing 68-1/5 acres, more or less, and being the same land described in a deed from J. W. Rogers,
W. H. Rogers and F. E. Rogers to J. F. Rogers,
58 Feby. 28, 1899, rec. Vol. "R", pp. 59-60, Deed
Records of Gregg County, Texas, save and except
2 acres out of the N. W. cor. sold to R. M. Wood.

subject to the terms and provisions of that certain oil and gas lease dated October 20, 1930, executed by Mrs. L. J. Rogers, et al, to W. P. Chandler, and recorded in Vol. 61, page 295, Deed Records of Gregg County, Texas; and it is therefore Ordered, Adjudged and Decreed by the Court that Complainant, Empire Oil & Refining Company, be quieted in its title and possession of the oil and gas leasehold estate and 7/8ths of the minerals on, in and under said tract of land described in this paragraph, subject to the terms and provisions of said oil and gas lease.

(5) It is further Ordered, Adjudged and Decreed by the Court that the oil and gas lease owned by B. P. Dunlap

above described in paragraph (2) of this decree, does not constitute a cloud upon the title of Complainant to the oil and gas leasehold estate and minerals on, in and under the tract of land above described in paragraph (4), it being the decree of this Court that the tract of land covered by the oil and gas lease to said B. P. Dunlap, described in paragraph (2) hereof lies immediately West of and adjacent to the tract of land described in paragraph (4), upon which the Empire Oil & Refining Company owns an oil and gas lease.

It is further Ordered, Adjudged and Decreed by the Court that the defendant, B. P. Dunlap, on his cross-action herein filed, have of and recover from Empire Oil & Refining Company, judgment and decree quieting his title and possession of the oil and gas leasehold estate and 7/8ths of the minerals on, in and under the tract of land above described in paragraph (2) hereof, subject to the terms of said lease to B. P. Dunlap.

(7) It is further Ordered, Adjudged and Decreed that the defendants, Curtis M. Willock and J. B. Parker are likewise bound by the decree herein, since their right to any royalty interest is under the Complainant, Empire Oil & Refining Company's lease.

(8) It is further Ordered, Adjudged and Decreed that any actions or parties to this suit not finally herein disposed of are hereby dismissed.

59 (9) It is further Ordered, Adjudged and Decreed by the Court that Complainant's bill of complaint be and the same is hereby dismissed with prejudice for want of equity insofar as Complainant seeks to remove cloud and quiet title to the oil and gas leasehold estate on the strip of land described in paragraph (2) hereof.

(10) It is further Ordered, Adjudged and Decreed by the Court that defendants have of and recover from Complainant, Empire Oil & Refining Company, all costs in their behalf expended, for which let execution issue.

The Court will make and file herein findings of fact and conclusions of law, separately from this decree.

To which action and ruling of the Court in entering this decree, Complainant, Empire Oil & Refining Company, and defendants, Curtis M. Willock and J. B. Parker, each, in open Court, excepted and such exceptions are allowed.

Entered this the 30 day of April, A. D. 1938.
(Sgd) RANDOLPH BRYANT,
Judge Presiding.

Decree. Filed May 2, 1938.

FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER EQUITY RULE 70½.

60 Filed April 30, 1938.

(Title Omitted.)

Statement of the Case.

On January 11, 1936, Empire Gas & Fuel Company, a corporation, filed its amended and substituted bill of complaint in this cause, naming as Respondents, B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and her husband, Azzie Waskom, Curtis M. Willock and J. B. Parker, to quiet its title to the oil and

gas leasehold interest and estate and 7/8ths of the minerals on, in and under a strip of land 66.89 feet by 1883 feet on the west side of the east one-half of the G. A. Thomason 640 acre headright survey situated in Gregg County, Texas.

Respondents, B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, J. E. Rogers and wife, Ola Mae Rogers, and Elvie Waskom and husband, Azzie Waskom, answered by motions to dismiss and special denials, averring that Complainant did not own the oil and gas lease on the strip of land. Respondents also filed a cross-bill to quiet their title to said tract of land.

Findings of Fact.

The facts, for the purposes of the decree, are substantially as follows:

1. Empire Gas & Fuel Company, original Complainant, was duly incorporated under the laws of the State of Maine, and is a citizen of such State; Empire Oil & Refining Company is the successor of Empire
61 Gas & Fuel Company, and was substituted as Complainant herein, and was duly incorporated under the laws of the State of Delaware, and is a citizen of such State. Both are private corporations doing business in Texas under permits duly issued by the Secretary of State. All respondents, except Curtis M. Willock and J. B. Parker, are citizens of the State of Texas, and some of them reside in the Tyler Division of this Court. Willock is a citizen of the State of California. Parker is a citizen of the State of Louisiana. The action is to remove cloud from the alleged title of Complainant, and to quiet such title, to the oil, gas and mineral leasehold estate in a strip of land about 66 feet wide and 1883 feet long in the G. A. Thomason Survey in Gregg County, Texas. Such leasehold estate, as well as the claims of each of

Respondents thereto sought to be removed in this suit, are of a value in excess of Three Thousand ($3,000.00) Dollars, and each of such claims depreciate the value of Complainant's title, if valid, in excess of Three Thousand ($3,000.00) Dollars, and this Court has jurisdiction.

2. The G. A. Thomason Survey 175 was patented on June 2, 1854, by the State of Texas to Matthew Cartwright, Assignee of George A. Thomason, as containing 640 acres of land. The tract was described by metes and bounds in the patent to be in the form of a square 1900.8 varas, with the boundary lines extending due north, south, east and west. Bearing trees were called for at the four corners, but such trees were destroyed prior to the time Complainant filed its bill of complaint. There was testimony introduced showing, by reputation, the location of said trees, and from all of the evidence introduced, as well as the agreement of the parties made during the trial of the cause, the Court finds that, from a survey made on the ground of the Thomason Survey 175 the north line is now fixed at 1946.4 varas, the south line at 1934 varas, the east line at 1938 varas and the west line at 1940 varas.

3. By mesne conveyances, the fee simple title to the east one-half of said G. A. Thomason Survey 175 vested in Louisa Rogers on September 7, 1882. From the testimony introduced and the agreement of the parties made during the trial of the cause, the Court finds that, on September 7, 1882, Louisa Rogers owned, in fee
62 simple, title to the following part and parcel of the said G. A. Thomason Survey, as shown by her deed:

The east half of survey No. 175 of G. A. Thomason headright certificate known as follows:

Commencing at the SE. corner of Survey No. 175; thence N. 1900 vrs. to a stake from which a pine brs. S.

89 deg. E. 7 vrs. a red oak brs. N. 61 deg. E. 8-8/10 vrs; thence W. 950 varas; thence South 1900 vrs.; thence East to the beginning, containing three hundred and twenty acres of land, more or less.

The strip involved in this controversy is that certain tract of land lying along the west side of the tract of land above described, which above tract was owned by Louisa Rogers, on September 6, 1882, and was acquired by her through a deed from Alexander Rogers.

4. Sometime between September 6, 1882, and February 28, 1899, Louisa Rogers died intestate and left as her sole surviving heirs at law four sons, to-wit: W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers.

5. On and prior to February 28, 1899, W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers owned in fee simple the east one-half of the said G. A. Thomason Survey, as described in deed to Louisa Rogers, above copied.

6. On or about February 28, 1899, W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers employed J. H. Simmons, a surveyor, to make a survey on the ground of the land described above for the purpose of partitioning said tract into three parcels. Thereafter J. W. Rogers, J. F. Rogers and F. E. Rogers made, executed and delivered to W. H. Rogers on February 28, 1899, their certain deed conveying fee simple title to the following described tract of land:

Starting at N. E. corner of the Rogers tract, running South 880 yards; thence West 374 yards; thence North 308 yards; thence West 66 yards; thence North 572 yards; thence East 440 yards; to starting point, containing 75 4/5 acres, more or less.

On the same day and date, W. N. Rogers, J. W. Rogers and F. E. Rogers made, executed and delivered to J. F.

Rogers their certain deed conveying the fee simple title to the following described tract of land:

63 Being a part of the G. A. Thomas Headright Survey, starting at the N. E. corner of Lot No. 2, which is the N. W. corner of the W. H. Rogers tract, Lot 1, running West 440 yards to Wiley Davis N. E. corner; thence South 880 yards; thence East 224 yards; thence North 310 yards at 12 deg. East of North; thence East 754 yards to W. H. Rogers line; thence North 572 yards to starting point, containing 68-1/5 acres, more or less, with all the improvements thereon.

On the same day and date J. F. Rogers and W. H. Rogers made, executed and delivered to J. W. Rogers and F. E. Rogers their certain deed conveying fee simple title to the following described tract of land:

Being a part of the G. A. Thomas Headright Survey #175, starting at the S. E. corner of the Rogers tract, running North 880 yards; thence West 374 yards; thence North 308 yards; thence West 220 yards; thence South 310 yards at 12 deg. West of South; thence West 224 yards; thence South 880 yards; thence East 880 yards to starting point, containing 176 acres, more or less.

7. J. H. Simmons, in making the survey for W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers, prior to the execution of said deeds, began at the northeast corner of said G. A. Thomason Survey and measured west along the north line of said Thomason Survey a distance of 440 yards, set a stake and then measured south a distance of 880 yards, and then measured east a distance of 440 yards. From this work on the ground J. H. Simmons prepared the distribution contained in the deed from the three brothers to W. H. Rogers, covering tract No. 1 of 75-4/5 acres.

In making a survey on the ground for tract No. 2 J. H. Simmons began on the north line of the Thomason Survey at a point 440 yards west of the northeast corner of said survey, being at the point he had determined as the northwest corner of tract No. 1, and ran a line west along the north line of said Thomason Survey a distance of 440 yards and there set a stake for the northwest corner of Lot No. 2, and told the four Rogers boys, who were accompanying him on the survey, that there was a chain left between the point where he had stopped and set the stake, after measuring 880 yards from the northeast corner of said Thomason Survey and the northwest corner of their land, after measuring 880 yards from the northeast corner of the survey it was about one chain (66 feet) to the northwest corner of their land, which corner, from
a fair inference from the evidence, was the
64 northeast corner of the Wiley Davis land, though the surveyor Simmons did not mention the Davis corner to the Rogers boys at the time of the survey; neither did he survey to said corner; nor did he endeavor to locate said corner at the time he was making the partition for the Rogers boys. The four Rogers boys, viz., W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers, who were with said J. H. Simmons, informed him that they would leave the 66 feet out of the partition and use the same jointly and keep it like it was; the same 66 foot tract was then being used in part as a logging road.

At the time of the partition, the east one-half of the Thomason Survey "was rated at 320 acres", and when Mr. Simmons was employed to make the survey, he was told by F. E. Rogers that the four Rogers boys, who were the owners, wanted him to divide the land into four 80-acre blocks. After J. H. Simmons set the stake for the northwest corner of tract No. 2 at a distance of 880 yards from the northeast corner of the Thomason Survey, he measured South a distance of 880 yards and there set a stake, at a ponit now evidenced by the old gear wheel,

placed there soon thereafter as a corner stake, where it has remained for more than thirty years. The deeds to partition the four 80-acre blocks for the heirs of Rogers were prepared from the survey made upon the ground by J. H. Simmons, though the south portion of the partition was from a calculation. The field notes were not prepared for several days after the survey was made upon the ground.

8. The Court finds that in the field notes contained in the deed from W. H. Rogers, J. W. Rogers and F. E. Rogers to J. F. Rogers covering tract No. 2, no mention was made of the stake which J. H. Simmons drove in the ground on the north line of the Thomason Survey 880 yards west of the northeast corner of said Thomason Survey, nor was any mention made in the field notes contained in said deed to the stake driven in the ground at a point 880 yards south and 880 yards west of the northeast corner of the G. A. Thomason survey.

9. The Court finds that a few years after the stake was driven in the ground by J. H. Simmons at a point 880 yards west and 880 yards south of the northeast corner of the G. A. Thomason Survey, as the southwest corner of Tract No. 2, such stake was removed and an iron gear shaft was driven in the ground at the place where said stake was originally placed by J. H. Simmons, and said gear shaft was found in the ground at the time this cause was tried and has been there for some 30 years, and said gear shaft is at a point 880 yards west of the east line of the Thomason Survey, and 880 yards south of the North line of said Thomason Survey. However, the gear shaft was not mentioned in any conveyance introduced in evidence at the time Complainant, Empire Gas & Fuel Company, acquired its oil and gas lease, but the gear wheel was observed and noted by the surveyors of the Complainant, Empire Gas & Fuel Company before it took its corrected

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lease, to correct the field notes of the land which it actually claimed under the W. P. Chandler lease and which was actually covered by the W. P. Chandler lease herein referred to.

10. About 1900, J. F. Rogers died, leaving surviving him his wife, Mrs. L. J. Rogers, and two children, Elvie, who later married Azzie Waskom, and J. E. Rogers as his sole surviving heirs at law, and no administration was had upon his estate and no necessity existed therefor and at the time Mrs. L. J. Rogers and her children executed said oil and gas lease under which Complainant, Empire Gas & Fuel Company, claims title, the said lessors in said lease were the owners in fee simple of the land described in the deed from W. H. Rogers, et al, to J. F. Rogers, dated February 28, 1899.

11. On May 7, 1917, Mrs. L. J. Rogers and her two children, Elvie Waskom and J. E. Rogers made, executed and delivered to J. W. Mings their certain deed conveying and vesting in the said J. W. Mings fee simple title to the following described tract of land:

Beginning at the N. W. corner of our 68-acre tract, said beginning corner is about 953 vrs. west of the N. E. corner of said G. A. Thomason H. R. Survey; thence East 147 feet to corner on the N. E. line of G. A. Thomason Survey, witness P. O. tree about 12 in. dia. brs. W. 5 feet; thence South with fence 757 feet to corner, said corner being 21 feet S. E. of S. E. corner of residence; thence west 115 feet to E. side of Union Grove public road, witness B. J. tree bears N. about 10 deg. East 75 feet; thence with meanderings of said road to the place of beginning, containing about two acres of land, more or less.

The above tract of land is located north of the 66 foot strip claimed by Complainant and Respondents. Complainant and Respondents have not asserted any right,

title or interest in or to the land covered by the deed from Mrs. L. J. Rogers and her children to J. W. Mings above described.

66 12. On October 20, 1930, said heirs of J. F. Rogers executed an oil, gas and mineral lease to W. P. Chandler using the same description contained in the said deed from W. H. Rogers, et al, to J. F. Rogers, excepting said two (2) acre J. W. Mings tract last above described, and stating "it being the intention to include all land owned or claimed by Lessors in said survey." Said lease was assigned to Complainant, and is now owned by it and is a valid and subsisting lease.

13. On May 8, 1931, said heirs of J. F. Rogers executed to Empire Gas & Fuel Company a correction lease containing the following description:

Being a part of the G. A. Thomas headright. Starting at the N. E. corner of Lot No. 2 which is the N. W. corner of the W. H. Rogers tract No. 1; thence N. 39 deg. 44' W. a distance of 1228.19 ft.; thence S. 0 deg. 56' W. a distance of 726.32 ft., thence S. 80 deg. 59' W. a distance of 118.34 ft., thence S. 1 deg. 03' E. a distance of 1919.14 ft., thence N. 89 deg. 30' E. a distance of 728.89 ft., thence N. 10 deg. 36' E. a distance of 940.45 ft., thence N. 88 deg. 31' E. a distance of 462.24 ft., thence N. 1 deg. 29' W. a distance of 1715.64 ft., to the point of beginning, said tract to contain 66-1 5 acres, more or less. It being the intention of the lessor herein to lease all land owned by them in said survey, and containing 66-1 6 acres, more or less.

This lease is now owned by the substitute Complainant which, together with its predecessors, took possession of the land therein described, drilled wells for oil thereon, produced and is producing oil therefrom, and has paid the rentals and royalties therein provided. However, none of the parties have drilled any wells on the land in

controversy. By conveyances from the said heirs of J. F. Rogers, introduced in evidence, Curtis M. Willock is the owner of one-fourth (¼) of the minerals and J. B. Parker of one-thirty-second (1/32) of the minerals under the land partitioned to J. F. Rogers, subject to Complainant's said lease, each owning a proportionate part of the royalties payable under such lease.

The northwest corner of the W. H. Rogers tract No. 1, referred to as being at the Northeast corner of Lot No. 2 in the correction lease given by the heirs of J. F. Rogers to the Empire Gas & Fuel Company, Complainant, was located at a point 440 yards west of the northeast corner of the G. A. Thomason Headright Survey No. 175.

14. The Court finds that J. F. Rogers never acquired title under the partition deed executed February 28, 1899, to the strip of land situated between a line run South from the Wiley Davis northeast corner
67 and a line run South from a point 880 yards west of the northeast corner of the Thomason Survey to the gear shaft. The Court find that J. F. Rogers never acquired title under said deed to said strip, but that all land lying between a line run south from the Wiley Davis Northeast corner and a line run south from a point 880 yards west of the northeast corner of said Thomason Survey was not covered by said deed. When Mrs. L. J. Rogers and her two children made, executed and delivered to W. P. Chandler, on October 20, 1930, the oil and gas lease under which Complainant claims title to the strip, said Mrs. L. J. Rogers and her children did not own the fee simple title to all of said strip of land, but said fee simple title was then owned by the said heirs of Louisa Rogers, deceased.

15. The Court finds that the oil, gas and mineral lease and leasehold estate of Complainant, Empire Oil & Refining Company, originally executed in favor of W. P.

Chandler, dated November 18, 1930, does not cover nor include any land west of a line running north from the old bevel gear and said oil and gas lease does not cover and include the 66 foot strip situated between the line running south from the Wiley Davis northeast corner, wherever situated, and a line running south from a point on the north line of the Thomason Survey 880 yards west of the northeast corner to the gear shaft, and that the West line of plaintiff's lease coincides with the East line of the Dunlap lease.

16. The Court finds that the call for the Wiley Davis northeast corner contained in the partition deed from W. H. Rogers and others to J. F. Rogers, dated February 28, 1899, was inserted through mistake, and the Surveyor set a stake 880 yards west of the northeast corner of said Thomason Survey, and another stake south at 880 yards where the gear shaft now stands, to mark the west line of the J. F. Rogers tract, although the partition deed did not call for said two stak The Court finds that the stake set by Simmons on the north line 880 yards from the northeast corner disappeared prior to the trial of this cause.

17. The Court finds that the oil and gas lease under which Respondent, B. P. Dunlap, claims, covers and includes such strip of land 66 feet wide and complainant's oil and gas lease, nor its purported corrected lease, do not cover said strip. The ratification or correction lease covers the same land as the original lease, the only difference being a change from yards to feet in the description calls and a correction of an obvious error in one
68 of the calls of the original lease. Such was the representation at the time the correction lease was obtained, and such correction lease called to begin as follows: "Being a part of the G. A. Thomason Headright, starting at the northeast corner of Lot No. 2, which is the northwest corner of the W. H. Rogers tract No. 1";

and the Court finds that the northwest corner of W. H. Rogers tract No. 1 was partitioned and surveyed at the time of the partition to be at a point 440 yards west of the northeast corner of the G. A. Thomason Headright Survey.

18. Sometime prior to the date Mrs. L. J. Rogers and her son and daughter executed the oil and gas lease to W. P. Chandler, J. W. Rogers died intestate and left surviving him as his sole heirs at law his two brothers, W. H. Rogers and F. E. Rogers and the heirs of a deceased brother, J. F. Rogers, to-wit: Mrs. L. J. Rogers, J. E. Rogers and Elvie Rogers Waskom.

19. The Court finds as a fact that the surveyors of the Complainant testified that there was an ambiguity in the partition deed and in the lease of the Complainant when it was attempted to be applied to the ground, and, upon such admission of ambiguity, the Court heard evidence as to the footsteps of the original survey at the time of the partition and as to the intent of the parties in making such instruments.

Conclusions of Law.

1. The Court concludes from the foregoing facts that Complainant's bill is without equity. The oil and gas lease of Respondent, Dunlap, does not constitute a cloud on the title of Complainant, Empire Oil & Refining Company, to the tract of land covered and included in the oil and gas lease executed by Mrs. L. J. Rogers, et al, to W. P. Chandler, dated October 20, 1930. The oil and gas lease owned and held by Respondent, B. P. Dunlap, covers and includes the tract of land lying immediately west of and adjacent to the lands covered by the said oil and gas lease of Empire Gas & Refining Company.

2. That the call for the Wiley Davis corner in the partition deed of 1899 and subsequent instruments following

such deed call, should be rejected as inserted by mistake, and controlling effect should be given to course and distance from the known and undisputed northeast
69 corner of the Thomas Survey and other known and undisputed corners, line trees and corners agreed to be correct at the trial, for such construction is most consistent with the intention of the parties to the deeds from the entire description and the equities of the case from all the facts, and is most consistent with the construction of the calls by the parties themselves, as evidenced by their acts and conduct over a period of about 30 years subsequent to the date of the partition and prior to discovery of oil in East Texas.

3. The Respondent Dunlap is entitled to have the title to such tract of land quieted as against Complainant on his plea for affirmative relief.

4. The Court concludes that extrinsic evidence was admissible to show that the surveyor Simmons, at the time he made the partition survey, placed a stake at a point 880 yards west of the northeast corner of the said Thomason Survey for the northwest corner of the J. F. Rogers tract, and another stake 880 yards south thereof at a point now, and for more than 30 years, located by the old gear wheel. Also, extrinsic evidence was admissible to prove that one of the stakes was removed and the gear-shaft placed where said stake was originally driven, as the Court concludes that the correction lease obtained either does not cover the 66 feet involved in this controversy or it takes in more land than it was represented to cover at the time it was obtained.

The correction lease and the original lease, separately and taken together, when application of the calls is made to the land on the ground, create an ambiguity and, when taken in connection with the description of the partition deed to J. F. Rogers, create an ambiguity. If effect is

given to the call "thence west 440 yards to the northeast corner of the Wiley Davis tract; thence south 880 yards; thence east 224 yards; thence north 310 yards at 12 deg. E. of north; thence East 54 yards to W. H. Rogers' line; thence North to the beginning, it would leave out a strip of land 68 feet wide west of the J. F. Rogers old fence, along the line North 310 yards at 12 deg. E. of North; for, if you run from the southwest point, as claimed by the complainant herein, at a point 880 yards
70 south of the northeast corner of the Wiley Davis tract of land, and then run East 224 yards (the call in the original partition deed and in the original lease to W. P. Chandler and in the assignment from Chandler to the complainant), there will be 68 feet between J. F. Rogers' fence and the call distance; then to run north 310 yards at 12 deg. east of north, there will be 68 feet between the line as called for and as surveyed and the fence line of the Rogers tract of land. This ambiguity, from all the facts, compels the conclusion that the intention of the parties was not to take in the 68 feet west of the gear wheel, in controversy, and that it was purposely left out of the partitioned land. Furthermore, when the complainant, Empire Gas & Fuel Company, represented to the heirs of J. F. Rogers that their correction lease did not cover any more land than the original lease, and thereby obtained the same, it is in no position now to claim otherwise, in an equitable action. In other words, if the complainant were entitled to rely on the call to the Wiley Davis corner, at the north, it would be confined to the call of 224 yards east from the point 880 yards south of the said corner, and a strip of 68 feet would be outside the calls of their lease, along the east side thereof. They cannot take an excess of land at the north and also take an excess at the southeast. Complainant, as a matter of equity, cannot claim that its correction lease covers the land on the east and also on the west, when the original lease either covered the land on the east or the land on the west, but not both.

Complainant's original lease either stopped at a point 880 yards west of the northeast corner of the Thomason Survey and ran south to the gear wheel—that is, it ran west from the northwest corner of Lot No. 1, partitioned to W. H. Rogers (which point was 440 yards west of the northwest corner of the G. A. Thomason Headright Survey No. 17'); thence west 440 yards; thence south 880 yards; thence east 224 yards; thence north 310 yards, at 12 deg. E. of north; thence east 154 yards to W. H. Rogers' line—or it ran west to Wiley Davis' northeast corner, south to M. O. Sheppard 36-acre northeast corner; thence east 224 yards for corner; thence north 12 deg. East 310 yards for corner; thence east 154 yards to W. H. Rogers' line.

71 In other words, the original lease either left outside its calls the land claimed by the defendants herein on the west, or does not cover the land claimed by the defendants on the east. The correction lease, not taking in more land than the original lease, could not be extended on the west and also be extended, at the southeast corner, to the east, 68 feet.

The complainant cannot claim, in an equity suit, under two instruments represented by it to cover the same land, when to give effect to complainant's contention would be to extend the calls of the original instrument beyond its calls and to take in and include land not covered by the original instrument.

(Signed) RANDOLPH BRYANT.

(Entered April 30, 1938.)

Findings of Fact and Conclusions of Law Filed May 2, 1938.

OBJECTIONS AND EXCEPTIONS OF COMPLAINANT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

72 (Title Omitted.)

May it please the Honroable Court:

Complainant files and presents the following objections and exceptions to the Court's findings of fact and conclusions of law heretofore filed in this cause:

I.

Complainant objects and excepts to all of section 7 of the Court's findings of fact and conclusions of law for the following reasons:

(1) There is no competent testimony to support said finding because the testimony that the surveyor set stakes introduced by defendants over complainant's objection varied and contradicted the terms of the partition deed to J. F. Rogers and the oil and gas lease to Chandler and said testimony was in derogation of the estate granted, in that the deed and lease did not call for stakes but called for course and distance and an adjoinder with the Wiley Davis Northeast corner. The partition deed and lease having called for the Wiley Davis Northeast corner and not having called for stakes, parol testimony was not admissible to show that the surveyor set stakes short of the Wiley Davis Northeast corner;

(2) The finding is against the overwhelming weight and great preponderance of the credible testimony because the field notes in the handwriting of the surveyor introduced in evidence showed that the surveyor did not measure across the North line of the East one-half of said Thomason Survey but measured across the South line of

the North one-half of the East one-half of said
73 survey to the Bozeman line, which line was well known to the surveyor and was the East line of the West one-half of said survey;

(3) The finding is based on incompetent and inadmissible testimony, because there was no evidence introduced showing that the complainant knew that the surveyor did not actually survey to the Wiley Davis Northeast corner, and there was no testimony introduced showing that complainant knew that the heirs of Louisa Rogers instructed the surveyor to stop short of the Wiley Davis Northeast corner for the purpose of leaving unpartitioned a strip of land for a road;

(4) The finding is contrary to the allegations of defendants' answer wherein they plead that the surveyor never surveyed the West line of the tract of land partitioned to J. F. Rogers.

(5) The finding that the 66 foot strip was being used in part as a logging road is unsupported by any competent testimony because all the testimony showed that the 66 foot strip was being used for a road.

II.

Complainant objects and excepts to all of section 9 of the Court's findings of fact and conclusions of law for the following reasons:

(1) There is no competent testimony to support said finding because the testimony that the surveyor set stakes introduced by defendants over complainant's objection varied and contradicted the terms of the partition deed to J. F. Rogers and the oil and gas lease to Chandler and said testimony was in derogation of the estate granted, in that the deed and lease did not call for stakes but

called for course and distance and an adjoinder with the Wiley Davis Northeast corner. The partition deed and lease having called for the Wiley Davis Northeast corner and not having called for stakes, parol testimony was not admissible to show that the surveyor set stakes short of the Wiley Davis Northeast corner;

74 (2) The finding is against the overwhelming weight and great preponderance of the credible testimony because the field notes in the handwriting of the surveyor introduced in evidence showed that the surveyor did not measure across the North line of the East one-half of said Thomason Survey but measured across the South line of the North one-half of the East one-half of said survey to the Bozeman line, which line was well known to the surveyor and was the East line of the West one-half of said survey;

(3) The finding is based on incompetent and inadmissible testimony, because there was no evidence introduced showing that the complainant knew that the surveyor did not actually survey to the Wiley Davis Northeast corner, and there was no testimony introduced showing that complainant knew that the heirs of Louisa Rogers instructed the surveyor to stop short of the Wiley Davis Northeast corner for the purpose of leaving unpartitioned a strip of land for a road.

III.

Complainant objects and excepts to the last paragraph of section 13 of the Court's findings of fact because the said finding is not supported by any competent and admissible testimony and is against the overwhelming weight and great preponderance of the credible testimony.

IV.

Complainant objects and excepts to all of sections 14 and 15 of the Court's findings of fact and conclusions of law for the following reasons:

(1) There is no competent testimony to support said finding because the testimony that the surveyor set stakes introduced by defendants over complainant's objection varied and contradicted the terms of the partition deed to J. F. Rogers and the oil and gas lease to Chandler and said testimony was in derogation of the estate granted,
in that the deed and lease did not call for stakes
75 but called for course and distance and an adjoinder with the Wiley Davis Northeast corner. The partition deed and lease having called for the Wiley Davis Northeast corner and not having called for stakes, parol testimony was not admissible to show that the surveyor set stakes short of the Wiley Davis Northeast corner;

(2) The finding is against the overwhelming weight and great preponderance of the credible testimony because the field notes in the handwriting of the surveyor introduced in evidence showed that the surveyor did not measure across the North line of the East one-half of said Thomason Survey but measured across the South line of the North one-half of the East one-half of said survey to the Bozeman line, which line was well known to the surveyor and was the East line of the West one-half of said survey;

(3) The finding is based on incompetent and inadmissible testimony, because there was no evidence introduced showing that the complainant knew that the surveyor did not actually survey to the Wiley Davis Northeast corner, and there was no testimony introduced showing that complainant knew that the heirs of Louisa

Rogers instructed the surveyor to stop short of the Wiley Davis Northeast corner for the purpose of leaving unpartitioned a strip of land for a road;

(4) The finding is contrary to the law when applied to the other findings of the Court because the Court has found that the 66 foot strip was being used as a road at the time of the partition and has found that the course and distance calls of the field notes in the partition deed to J. F. Rogers extended only to the East (inner) edge of said road. Therefore the Court should have found that the title to said strip passed to J. F. Rogers under the partition deed subject to the easement, it being the law that where a road is wholly laid out on property of the grantor, the grantee will take fee title to all the road where the field note description goes to the inner edge of said road.

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V.

Complainant objects and excepts to all of section 16 of the Court's findings of fact and conclusions of law for the following reasons:

(1) There is no competent testimony to support said finding because the testimony that the surveyor set stakes introduced by defendants over complainant's objection varied and contradicted the terms of the partition deed to J. F. Rogers and the oil and gas lease to Chandler and said testimony was in derogation of the estate granted, in that the deed and lease did not call for stakes but called for course and distance and an adjoinder with the Wiley Davis Northeast corner. The partition deed and lease having called for the Wiley Davis Northeast corner and not having called for stakes, parol testimony was not admissible to show that the surveyor set stakes short of the Wiley Davis Northeast corner;

(2) The finding is against the overwhelming weight and great preponderance of the credible testimony because the field notes in the handwriting of the surveyor introduced in evidence showed that the surveyor did not measure across the North line of the East one-half of said Thomason Survey but measured across the South line of the North one-half of the East one-half of said survey to the Bozeman line, which line was well known to the surveyor and was the East line of the West one-half of said survey; and there was no evidence of a mistake in inserting the call for the Wiley Davis Northeast corner.

(3) The finding is based on incompetent and inadmissible testimony, because there was no evidence introduced showing that the complainant knew that the surveyor did not actually survey to the Wiley Davis Northeast corner, and there was no testimony introduced showing that complainant knew that the heirs of Louisa Rogers instructed the surveyor to stop short of the Wiley Davis Northeast corner for the purpose of leaving unpartitioned a strip of land for a road;

(4) The finding is based upon testimony improperly admitted against complainant, said testimony being that the surveyor set a stake at a place where the gear
77. shaft now stands. The heirs of Louisa Rogers partitioned to J. F. Rogers a tract of land described in the deed as follows: "starting at the Northeast corner of Lot No. 2, which is the Northwest corner of W. H. Rogers tract, Lot 1; running West 440 yards to Wiley Davis Northeast corner; thence South 880 yards". If the distance of the North line of said tract partitioned to J. F. Rogers was extended 66 feet, said line would reach the Wiley Davis Northeast corner and by accepting the call for adjoinder and rejecting the call for distance, the metes and bounds description would cover and include the 66 foot strip. Complainant having acquired its title under a chain of transfers of record calling for an

adjoinder with the Wiley Davis Northeast corner was an innocent purchaser and entitled to rely upon the call for said adjoinder as fixing the Northwest corner of the tract of land partitioned to J. F. Rogers and leased by the heirs of J. F. Rogers to W. P. Chandler. Complainant was entitled to rely upon the presumption of law that where owners executed partition deeds they intended to partition all the land and not leave small, irregularly shaped tracts unpartitioned and was further entitled to rely upon the presumption that the parties intended to partition the whole tract of land because there was no express exception of said 66 foot strip. There was no testimony introduced showing that complainant knew that the distance of the North line called for in the partition deed would not reach the Wiley Davis Northeast corner.

VI.

Complainant objects and excepts to all of section 17 because the finding is not supported by competent evidence and is against the great weight of credible testimony.

VII.

Complainant objects and excepts to all of section 19 because parol testimony was not admissible to show the grantors in the partition deed inserted the call for the Wiley Davis Northeast corner through mistake.

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VIII.

Complainant objects and excepts to the Court's conclusions of law for the following reasons:

(1) Said conclusions are based upon improper findings of fact;

(2) Said conclusions are erroneous statements of law under the Court's findings of fact because the Court found that the 66 foot strip was being used for a road; that fee title to said 66 foot strip was owned by the Rogers' heirs prior to their partition of the East one-half of said survey; that the course and distance calls of the field notes in the partition deed to J. F. Rogers went to the inner edge of said road. Under said findings of fact the Court should have concluded as a matter of law that, even though the call for the Wiley Davis Northeast corner was disregarded, J. F. Rogers acquired title to said 66 foot strip because the field notes in his partition deed extended to the edge of said road;

(3) Complainant being an innocent purchaser under a chain of transfers calling for the Wiley Davis Northeast corner was entitled to rely upon said call for adjoinder and parol testimony was not admissible against it to show that the call for the Wiley Davis Northeast corner was inserted through a mistake of the Rogers heirs. Complainant was entitled to rely upon the presumption of law that where owners executed partition deeds they intended to partition all the land and not leave small, irregularly shaped tracts unpartitioned and was further entitled to rely upon the presumption that the parties intended to partition the whole tract of land because there was no express exception of said 66 foot strip. There was no testimony introduced showing that complainant knew that the distance of the North line called for in the partition deed would not reach the Wiley Davis Northeast corner.

(4) The conclusions of law are improper and erroneous when applied to the findings of fact because the Court found that the 66 foot strip was owned by the heirs of Louisa Rogers but was not covered and included in the partition deed to J. F. Rogers. The testimony
79 showed that the heirs of J. F. Rogers who executed an oil and gas lease to W. P. Chandler,

owned an undivided one-third interest in the land inherited by J. F. Rogers from Louisa Rogers and therefore owned an undivided one-third interest in the 66 foot strip under the Court's findings of fact aforesaid. The oil and gas lease executed to W. P. Chandler contained a clause: "it being the intention to include all land owned or claimed in said survey." Under the Court's own findings of fact the lessors owned an undivided one-third interest in said 66 foot strip and therefore complainant acquired the interest of said lessors under the aforesaid clause in said oil and gas lease.

Wherefore, complainant presents the above and foregoing objections and exceptions to the Court's findings of fact and conclusions of law and prays that the said objections and exceptions be sustained and that the findings of fact and conclusions of law be set aside.

H. J. PATTERSON,
PHILLIPS, TRAMMELL, ESTES, EDWARDS & ORN,
CLAYTON L. ORN,
Attorneys for Complainant.

Objections and Exceptions of Complainant to Findings of Fact and Conclusions of Law. Filed June 14, 1938.

COMPLAINANT'S REQUEST FOR ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

80 (Title Omitted.)

May it Please the Honorable Court:

Complainant, believing that the findings of fact of the Honorable Court are insufficient for proper review of this cause by the Honorable Circuit Court of Appeals, respectfully requests the Court to make additional findings

of fact upon the material facts hereinafter set out and respectfully requests the Court to adopt the paragraphs hereinafter set out as a part of the Court's findings of fact:

I.

The Court finds from the evidence introduced and the agreement of the parties made during the trial of this cause, that the tract of land conveyed and covered by the deed from Augustus Rogers to Louisa Rogers of September 6, 1882, is that portion of the G. A. Thomason Survey lying East of a line beginning 967 varas West of the Southeast corner of the Thomason Survey, and extending North to the Northeast corner of the M. O. Sheppard 36 acre tract and thence North, intersecting the North line of the said G. A. Thomason Survey at a point 982.4 varas West of the Northeast corner of said survey. The Court further finds that the field notes as located on the ground and the boundaries of the tract of land conveyed to Louisa Rogers aforesaid covered and included the 66 foot strip of land involved in this controversy, it being the intention of the grantor in said deed to convey the East one-half of said G. A. Thomason Survey and it further being agreed between the parties to this lawsuit that the East one-half was separated from the West one-half by a line running from a point 967 varas West of the Southeast corner of the Thomason Survey North to the Northeast corner of the M. O. Sheppard 36 acre tract and thence North intersecting the North line of said Thomason Survey at a point 982.4 varas West of the Northeast corner of said survey.

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II.

The Court finds that on February 28, 1899, immediately preceding the date W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers executed the deeds, they, as

heirs of Louisa Rogers, owned in fee simple the East one-half of the said G. A. Thomason Survey, the West boundary line of said East one-half being a line starting at a point 967 varas West of the Southeast corner of said Thomason Survey, extending North to the Northeast corner of the M. O. Sheppard 36 acre tract and thence North intersection the North line of said G. A. Thomason Survey at a point 982.4 varas West of the Northeast corner of said survey. The Court finds that on said date the said four Rogers heirs owned the 66 foot strip of land in controversy, said strip being a part of the East one-half of said Thomason Survey.

III.

The Court finds that on February 28, 1899, J. W. Davis (commonly called Wiley Davis) owned a tract of land in the Northeast corner of the West one-half of the said Thomason Survey, the said tract of land owned by the said Wiley Davis being fully described in a deed from J. T. Victory et al. to J. W. Davis, dated October 17, 1891. The Northeast corner of the Wiley Davis tract of land was a well established and well marked and identified corner and said corner was located 982.4 varas West of the Northeast corner of survey 175, and 964 varas East of the Northwest corner of Survey 175. The Court finds that in 1899 the Wiley Davis Northeast corner was witnessed by a pine tree and the East line of said Davis tract was well marked by marked trees.

82. IV.

The Court finds that in 1899, J. H. Simmons and F. E. Rogers knew the locations of the Northeast corner of the Wiley Davis tract of land described in the deed from J. W. Victory et al to the said J. W. Davis. The Wiley Davis Northeast corner in said date was located 982.4 yaras West of the Northeast corner of the said Thomason Sur-

vey 175 and 964 varas East of the Northwest corner of said survey.

V.

The Court finds that on February 28, 1899, W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers intended to divide and partition all of the land they owned in the Thomason Survey by inheritance from their mother, Louisa Rogers, and said heirs owned said 66 foot strip in controversy. The said heirs intended to partition to J. F. Rogers Tract No. 2, described in the deed from W. H. Rogers et al to J. F. Rogers, and purposely and intentionally inserted the call for the Wiley Davis Northeast corner, and intended for the Northwest corner of said tract No. 2, partitioned to J. F. Rogers to be coincident with the Northeast corner of the J. W. (Wiley) Davis tract of land. The said Rogers heirs further intended for the West line of said Tract No. 2 and the East line of the J. W. Davis tract and the East line of the Bozeman tract to be conterminous, because they did not intend to leave unpartitioned the said 66 foot strip then and now being used as a road, said strip being situated along the West side of the tract they had inherited from their mother, Louisa Rogers, and a part of said tract of land owned by Louisa Rogers, being covered and included in the field note description in her deed.

VI.

The Court finds that at the time of the partition aforesaid, on February 29, 1899, there was a public road along the West side of the East one-half of said Thomason Survey. A line run North from the gear shaft (the present location of which was undisputed by the parties to this lawsuit) would define the East side of said road and the West side of said road was the West line of the East one-half of said Thomason Survey aforesaid. The Court

finds that said road, as located, was being used in 1899 and is now being used as a neighborhood outlet and road. The 66 foot strip of land involved in this
83 controversy was used as a road in 1899 and said strip has continuously, to this date, been used as a neighborhood road and outlet.

VII.

The Court finds that the East line of the tract of land conveyed by W. B. Hagan to B. M. Bozeman on November 18, 1858, and described as being the Southeast one-fourth and 11¾ acres of Northwest one-fourth of Survey 175, as located on the ground, begins at the agreed corner of the M. O. Sheppard 36 acre tract and goes North to the Northeast corner of said 36 acre tract and then North along a line drawn to the Northeast corner of the J. W. Davis tract; that a line drawn North from the Northeast corner of the M. O. Sheppard 36 acre tract to the Wiley Davis Northeast corner would constitute the East boundary line of the B. M. Bozeman land.

VIII.

The Court finds that in 1899 J. H. Simmons knew the location on the ground of the B. M. Bozeman tract of land in the Thomason Survey aforesaid and knew the location of the East line of said tract, the said J. H. Simmons having, prior to 1899, made a survey of said Bozeman tract, the said Simmons having actually run out on the ground, prior to 1899, the East line of said Bozeman tract. The Court finds that the East line of the said Bozeman tract is West of the West line of the 66 foot strip of land involved in this controversy.

IX.

The Court finds that when J. H. Simmons prepared the deed from W. H. Rogers et al to J. F. Rogers, covering tract 2 (Exhibit 6), the description used was made partly

from the work he had done in the field, according to the field notes (Exhibits 45, 46) and partly from an office survey. The first call in the deed begins "at the Northeast corner of Lot 2, which is the Northwest corner of the W. H. Rogers tract Lot 1." The surveyor knew where the Northwest corner of Lot 1 was located on the
84 ground, having actually gone to the corner, and marked trees at such corner. The next call is "running West 440 yards to Wiley Davis Northeast corner." The surveyor did not actually go on the ground and run the line West 440 yards, but he knew where the Wiley Davis Northeast corner was located, and intended for the Northwest corner of Tract No. 2 to be coincident with the Northeast corner of the Wiley Davis tract, and made the call in the deed for the purpose of partitioning all the land. The surveyor did not go on the ground and run the line in the call "thence South 880 yards" but he did run a line from a point on the East line of survey 175, 880 yards South of the Northeast corner, West to the Bozeman line. The Bozeman line is directly South of the Wiley Davis Northeast corner and the surveyor knew where the Bozeman line was located, having actually gone on the ground to the Bozeman line as shown by his field notes. He also knew where the Wiley Davis Northeast corner was located on the ground, and knew it was North of the Bozeman line, and that a line projected South from the Wiley Davis Northeast corner would run along the Bozeman line, (dividing the East one-half of survey 175 from the West one-half of said survey. The Northeast corner of the Wiley Davis Tract is North of the Southwest corner of tract No. 2, and said Wiley Davis Northeast corner is Northwest of the gear shaft which respondents contend marks the Southwest corner of tract 2. The surveyor did not actually run on the ground the call "thence East 224 yards" nor did he run on the ground the call "thence North 310 yards at 12 degrees East of North." The surveyor actually did run on the ground the East line of tract No. 2, which is the West line of tract

No. 1, and located on the ground the Northeast corner of Tract No. 2, which is the Northwest corner of Tract No. 1, and the evidence shows that all of the parties to this lawsuit, ever since they have been connected with their respective titles, have recognized, used and adopted the most Southerly Southeast corner of Tract No. 2, a point 278.3 vrs. East of the East line of the Bozeman tract, as shown on Exhibit 14 point E. The evidence further shows that the surveyor did not locate on the ground the line called "thence North 310 yards at 12 deg. East
85 of North" nor the call "thence East 154 yards to W. H. Rogers line," but that all of the parties to this lawsuit ever since they have been connected with the title, have recognized these two lines as being located at the places shown on Exhibit 14.

The Court finds as a fact that there was partitioned to J. F. Rogers the land claimed in the bill of complaint. That the Southwest corner of said tract, called for in said deed, when located on the ground, is 31.3 vrs. (87 feet) West of the gear shaft, and the Northwest corner is coincident with Wiley Davis' Northeast corner, and when located on the ground would be 31.3 vrs. (87 feet) West of a line run North from the gear shaft to the North line of the survey.

The Court finds that the defendants only claim the land situated 66.89 feet West of the gear shaft, and formed by running lines from the gear shaft, and from said point 66.89 feet West of the gear shaft, North until said lines intersect the North line of said survey, less 2 acres conveyed by the Rogers to Mings, and that complainant has sought to quiet its title only to the land claimed by defendants. Title to the land situated 7.6 vrs. West of a point 23.7 vrs. (66 ft.) West of the gear shaft, and lying West of a line North from said point West 23.7 vrs. of gear shaft to the North line of the survey is not in dispute in this suit.

X.

The Court finds that the tract of land partitioned to W. H. Rogers as Tract No. 1 (Exhibit 17) as located on the ground, begins at the Northeast corner of survey 175, and the line goes South along the East line of survey 175, a distance of 880 yards to a point witnessed by a red oak (it being agreed at the trial of the cause the red oak witnessed the Southeast corner of Tract 1); then the line as located on the ground runs West 404 vrs. (374 yards, the call distance being 374 yards); then North a distance of 334 vrs. (309 yards, the call distance being 308 yards); then West 71 vrs. (65.7 yards, the call distance being 66 yards); thence North to a point where said line intersects the North line of Survey 175, 487 vrs. West of the Northeast corner and then East 487 vrs. (450.9 yards, the call distance being 440 yards) to the place of beginning.

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Exhibit 14 correctly locates the boundaries of Tract No. 1, partitioned to W. H. Rogers, as said boundaries are located.

XI.

The Court finds that complainant, Empire Oil & Refining Company, owns and holds an oil and gas lease upon all the land owned by the lessors, Mrs. L. J. Rogers, et al., located in the said Thomason Survey and that the lease from Mrs. L. J. Rogers and others to W. P. Chandler, dated October 20, 1930, covered and included all land the lessors owned in the Thomason Survey. The Court finds that it was the intention of the lessors to lease to the said lessee the 66 foot strip of land involved in this controversy; that said lessors and lessee intended for the call for the Wiley Davis Northeast corner to control the call for course and distance and said lessors intended to lease to the said W. B. Chandler all land they owned in

the said Thomason Survey lying South and East of the said Wiley Davis corner.

XII.

The Court finds that it wa the intention of the lessors in the oil and gas lease to W. P. Chandler, which said lease is now owned by complainant, to lease and let for oil and gas, exploration and mining, all the land owned in said Thomason Survey, by said lessors, the said lease containing the clause "it being the intention to include all lands owned or claimed by lessor in said surveys."

XIII.

The Court finds that it was not the intention of Mrs. L. J. Rogers and others, lessors in the oil and gas lease dated October 20, 1930, executed and delivered to W. P. Chandler, to except or exclude from the land leased the 66 foot strip of land in controversy. The Court finds that the said W. P. Chandler under said oil and gas lease,
87 acquired all right, title and interest of the said lessors to the strip of land in controversy in this lawsuit.

XIV.

The Court finds that the field notes of the tract of land partitioned to J. F. Rogers, being the same tract of land described in the oil and gas lease from Mrs. L. J. Rogers et al. to W. P. Chandler, when run on the ground, covers and includes the 66 foot strip of land involved in this controversy; that it was the intention of the grantors in said partition deed to partition and set aside to the said J. F. Rogers said 66 foot strip as a part of the land described in said partition deed; that it was the intention of the lessors in said oil and gas lease to W. P. Chandler, to include the said 66 foot strip as a part of the land de-

scribed in said lease. The Court finds that by accepting the call in the partition deed, and the subsequent instruments, for the Wiley Davis Northeast corner, and rejecting the call for distance, the intention of the parties executing such instruments will be more clearly carried out, the said parties using said description, having intended that the call for the Wiley Davis Northeast corner would control over calls for distance.

Wherefore, complainant presents to the Honorable Court the above and foregoing request for additional findings of fact and prays that the Court will make and find each of the foregoing facts, but that in the event the Court refuses to find each of the facts set out above to be true, then that the Court consider each request as a separate request and make a finding thereon.

H. J. PATTERSON,
PHILLIPS, TRAMMELL, ESTES.
EDWARDS & ORN,
CLAYTON L. ORN,
Attorneys for Complainant.

Complainant's Request for Additional Findings of Fact and Conclusions of Law. Filed June 14, 1938.

ORDER OVERRULING AND DENYING COMPLAINANT'S REQUEST FOR ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

88 (Title Omitted.)

On this day came the Complainant at a regular term of the Court, and at the same term at which the decree was entered, and presented its request for additional findings of fact and conclusions of law;

The Court having considered said request for additional findings of fact and conclusions of law and being of the opinion that said request should be denied;

It is therefore Ordered that Complainant's request for additional findings of fact and conclusions of law be and the same is hereby denied, to which action and ruling of the Court Complainant, in open Court, duly excepted.

Entered this the 13th day of June, A. D. 1938.

RANDOLPH BRYANT,
Judge Presiding.

Filed June 14, 1938.

ORDER OVERRULING COMPLAINANT'S OBJECTIONS AND EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

89 (Title Omitted.)

On this day, at a regular term of this Court, being the same term at which the decree was entered herein, came Complainant and presented to the Court its objections and exceptions to the Court's findings of fact and conclusions of law; and Complainant having excepted at the time the Court entered said findings of fact and conclusions of law, and the Court having granted Complainant permission to file said specific exception and objections, and the Court having considered said objections and exceptions, is of the opinion that they are not well taken and should be overruled.

It is therefore Ordered by the Court that the Complainant's objections and exceptions to the findings of fact and

conclusions of law are overruled and to the entering of findings of fact and conclusions of law Complainant in proper time duly excepted.

Entered this the 13th day of June, A. D. 1938.

RANDOLPH BRYANT,
Judge Presiding.

Filed June 14, 1938.

MOTION OF COMPLAINANT SUGGESTING CHANGE OF ITS NAME TO CITIES SERVICE OIL COMPANY.

90 (Title Omitted.)

Comes now Complainant, Empire Oil & Refining Company, and respectfully represents to the Court that on or about July 31, 1937, it changed its corporate name to Cities Service Oil Company.

Wherefore, it moves the Honorable Court for permission to proceed in this action under the name of Cities Service Oil Company.

H. J. PATTERSON,
PHILLIPS, TRAMMELL, ESTES, EDWARDS & ORN,
Attorneys for Empire Oil & Refining Company.

Filed May 2, 1938.

ORDER AUTHORIZING COMPLAINANT TO PROCEED IN CAUSE UNDER NAME OF CITIES SERVICE OIL COMPANY.

91 (Title Omitted.)

Order.

On this day came Complainant, Empire Oil & Refining Company and made known to the Court that it had changed its name to Cities Service Oil Company and moved that permission be granted to proceed in this action under the name of Cities Service Oil Company;

It is Ordered that Complainant may proceed in this action under its changed name, to-wit: Cities Service Oil Company.

Entered at Sherman, Texas, this 30th day of April, 1938.

RANDOLPH BRYANT,
Judge.

Filed May 2, 1938.

91½ NOTE TO CLERK of United States Circuit Court of Appeals:

Statement of the Evidence and Bill of Exceptions, with the Court's approval (pages numbered 94 to 299 inclusive of this Transcript of the Record) is bound under separate cover and is a part of this Transcript. The index to said Statement of the Evidence is found on pages numbered II to VIII inclusive, and the index pages refer to the typewritten numbered pages in said bound Statement of the Evidence.

99 In the District Court of the United States, for the Eastern District of Texas, Tyler Division.

Empire Gas & Fuel Company

vs. No. 803 Equity.

B. P. Dunlap, et al.

Be it Remembered, that on the 27th day of April, A. D. 1936, the above entitled and numbered cause came on for hearing before the Honorable Randolph Bryant, a United States District Judge in and for the Eastern District of Texas, at Tyler, Texas, and continued from day to day to its conclusion; the complainant being represented by David B. Trammell, Esq., of Fort Worth, Texas, Cecil Cook, Esq., of Houston, Texas, and H. J: Patterson, Esq., of Bartlesville, Oklahoma; the defendants by Angus Wynne, Esq., Longview, Texas; during the trial of which cause the following evidence was introduced, objections made and exceptions reserved by the respective parties:

The pleadings of the respective parties were read to the Court.

JOHN F. BAKER, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Complainant:

"My name is John F. Baker and I live in Fort Worth, Texas. I am a surveyor and have been surveying land since 1924. I studied Civil Engineering for three
100 years at Texas A. & M. College and graduated in Civil Engineering at the University of Illinois. Since graduating I have been constantly engaged in surveying except for a period of one year."

Counsel for Defendants:

I think he is qualified.

(Direct Examination Resumed.)

By Counsel for Complainant:

"I have made a survey of the ground involving the location of the lines of the J. F. Rogers tract in the G. A. Thomason Survey in Gregg County. The surveying was done mostly in December, 1934, and January and February, 1935. Preliminary to making the survey, I made a title map, having been furnished with abstracts of title covering a number of tracts in the Thomason Survey. I had also been furnished with photostatic copy of the original field notes of the Thomason Survey, and the adjoining surveys, with the exception of the Hayden Edwards. I had copies of the patents also. I platted those descriptions from the patent on down to the present owners or as far as the title went, in order to make a working sketch, joining the calls for objects, distances, courses, etc. This map shows most of those calls. I made the title map before beginning my survey.

When I went on the ground I first made search for the original bearing trees called for at the corners of the Thomason Survey."

(In the preparation of this statement of the evidence, all acknowledgments of the exhibits hereinafter copied are omitted by agreement of the parties, there
101 being no controversy involved in the acknowledgments).

Counsel for Complainant:

We offer in evidence EXHIBIT No. 1.

The Court:

The exhibit is admitted in evidence and being in words and figures as follows:

"The State of Texas to M. Cartwright Assnee, Geo. A. Thomason.

Land Patent No. 414, Vol. 9.

Dated June 2, 1854.

Filed March 8, 1859.

Recorded Vol. H, page 352.

Deed Records Upshur County, Texas.

In the name of the State of Texas. To all to whom these presents shall come know ye I E. M. Pease, Governor of the State aforesaid by virtue of the power vested in me by law and in accordance with the laws of the said state in such case made and provided, do by these present grant to Matthew Cartwright, assignee of George A. Thomason his heirs or assigns, forever, six hundred and forty acres of land situated and described as follows: In Upshur County West of the Cherokee about 14 miles S 10 E from Gilmer by virtue of Certificate No. 143, issued by the Board of Land Commissioners of Jasper County on the 1st day of November, A. D. 1841, and transferred to said Cartwright on the 9th day of October, A. D. 1846, known as survey No. 175, beginning at the N E corner of No. 177 from which a sweet gum bears S 46 1/2 W 1 vara a post oak bears N 40 1/2 E 17 2/10 varas.

Thence South 1900 8/10 varas to a stake from which a pine bears S. 81 E 1 6/10 varas another bears South 1 vara;

Thence East 660 varas branch 1900 8/10 varas to a stake from which a black oak bears N 37 E 2 varas a pine bears N 17½ W 20 vara;

Thence North 1900 8/10 varas to the N W corner of No. 176 from which a pine bears S 19 W 14 6/10 varas another bears N 70 E 40 varas.

Thence West 1900 8/10 varas to the place of beginning. Thereby repinquishing the said Matthew Cartwright and his heirs or assigns forever all the right and title in and to said land heretofore held and possessed by the
102 said State and I do hereby issue this Leter Patent for the same.

In Testimony Whereof I have caused the seal of the State to be affixed as well as the seal of the General Land Office done at the City of Austin on the second day of June in the year of our Lord One Thousand Eight Hundred and Fifty-Four.

E. M. PEASE, Governor. L. S.

L. S. S. CROSBY, Commissioner of the Gl. Ld. Office."

(Direct Examination Resumed.)

By Counsel for Complainant:

"The Thomason Survey was surveyed on December 14, 1844, by C. D. Brooks and the field notes of the survey are the same as those contained in the patent.

I could not find any of the bearing-trees called for in the patent, although I tried to locate them. I ran all the lines of the survey, making search for the trees and for marked line trees that might have been made when the original work was done on the ground.

Not being able to find the bearing trees I located the corners of the survey by the fences which were used as the lines of the survey, where there were such fences, and used such fences to line up the corners.

At the Northeast corner, there is a fence running approximately North from the South and there is a fence continuing on North and a marked line to the East and a fence to the West.

At the Southeast corner, as it is used, and apparently located South of a new road, is a very old marked line North and South. There is a marked line to the West and a fence running West; but the road cuts the fence
103 off before the fence reaches the corner.

At the Southwest corner is a sweet gum. It is about in a line of a road to the North, although I do not believe the road now goes to that corner. It is in line of a road North of the Railroad.

At the Northwest corner I found evidences of possession, being a fence East and West. There is no fence North and South. The same ownership is found East of the line and West of the line.

Counsel for Complainant:

We offer in evidence EXHIBIT No. 2.

The Court:

The exhibit is admitted in evidence and being in words and figures as follows:

"Warranty Deed.

"M. Cartwright to Benj. N. Hampton.

Dated: May 18, 1855.

Filed: Aug. 22, 1859.

Recorded in Vol. H, page 563, Deed Records, Upshur Co., Tex.

"The State of Texas,
County of Upshur.

Know All Men By These Presents: That I, Matthew Cartwright, of said State and County of San Augustine, for and in consideration of the same of two Hundred Dollars, to me in hand paid by Benjamin N. Hampton, of said

State and County of Hopkins, the receipt whereof is hereby fully acknowledged, have granted, bargained, and sold and by these presents do grant, bargain, sell, alien, convey and deliver unto said Benjamin N. Hampton, his heirs and assigns, forever, six hundred and forty acres, the headright survey of George A. Thomason, secured to me said Cartwright by virtue of Patent No. 414, Vol. 9, dated at the City of Austin, 2nd day of June, A. D. 1854, as the assignee of said George A. Thomason.

104 To have and to hold said land and bargained premises, with all and singular the hereditaments and appurtenances unto the same belonging unto said Benjamin N. Hampton, his heirs or assigns forever, against myself, my heirs or assigns.

In testimony whereof, I hereunto set my hand and seal 18th day of May, A. D., Eighteen Hundred and Fifty-five, 1855.

M. CARTWRIGHT.

(Seal)

Witnesses:

F. V. McKEY (can't read)."

(Acknowledgment.)

Counsel for Complainant:

We offer in evidence EXHIBIT No 3.

The Court:

The exhibit is admitted in evidence and being in words and figures as follows:

"Deed.

"B. N. Hampton to Augustus Mosley.

Dated April 6th, 1853.

Filed: .....

Recorded Book D, page 499, Upshur County Deed Records.

The State of Texas,
County of Upshur.

Know All Men By These Presents: That I, Benjamin N. Hampton of the County of Hopkins in the State of Texas, for and in consideration of the sum of three thousand seven hundred and eighty dollars to me in hand paid by Augustus Mosley the receipt whereof is hereby acknowledged have this day bargained, sold and conveyed and do hereby bargain, sell and convey unto the said August Mosley all that certain tract or parcel of land situated and described as follows, to-wit:

In Upshur County on the waters of Moddies Creek about fourteen miles South from the town of
105 Gilmer described as follows to-wit:

Beginning at the N. E. corner of Survey No. 173, made for Benjamin N. Hampton, Administrator of the estate of George Hampton, deceased, a stake from which a pine bears S. 37 W 2 2 10 varas and another pine bears S 26 E 12 2-10 vrs.;

Thence West at 2850 varas a stake at the N. W. corner of a survey made for Benjamin N. Hampton, administrator of the estate of James Roark, deceased, N 174 a stake from which a black jack bears S 34 1/2 E 11 vrs. a black oak bears S 33 1/2 W 6 vrs.;

Thence South at 1900 vrs. the S. W. corner of said Survey No. 174 ac stke from which a pine bears S 87 E 7 vrs. a red oak bears N 61 E 8 8/10 varas;

Thence East at 1900 vrs. to a stake;

Thence South at 1900 vrs. a stake from which a pine bears S 8 1 E 1 6/10 varas and another pine bears *S 1 1 V*;

Thence East at 950 varas a stake on the South East corner of Survey No. 175;

Thence North 3800 vrs. to the place of beginning, containing twelve hundred and eighty acres of land and includes survey No. 173, containing two hundred and forty nine acres. Survey No. 174 containing one hundred and eighty eight acres of land and the East half of Survey No. 175 containing three hundred and twenty two and two thirds acres of land of the headright of Haden H. Edwards, together with all and singular the rights members hereditaments and appurtenances to the same belonging or in anywise incident or appertaining.

To Have and To Hold said premises herein before described unto the said August Mosley his heirs and assigns forever and I hereby bind myself, my heirs, executors and administrators to warrant and forever defend the title to said premises above described unto the said Augustus Mosley his heirs and assigns forever.

In Testimony Whereof, I have hereunto set my hand and seal using a scrawl instead of a seal on this sixth day of April, in the year of Christ one thousand eight hundred and fifty-three and word South interlined before signing.

B. N. HAMPTON. (Seal)

Test:

HEZEKIAH BARNES,
A. H. ABNEY."

(Acknowledgment.)

106 Counsel for Complainant:
We offer in evidence EXHIBIT No. 4.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Warranty Deed.

"A. Mosley to Alex Rogers

Dated: Apr. 2, 1855.

Filed: May 7, 1856.

Recorded in Vol. F, page 299, Upshur Co (Deed Records), Texas.

The State of Texas,
County of Upshur.

Know All Men By These Presents: That I, Augustus Mosley, of the State and County aforesaid, for and in consideration of the sum of Four Hundred and Eighty Dollars, the receipt of which I hereby acknowledge do hereby bargain, sell, alien and convey to Alexander Rogers, his heirs and assigns, a certain tract or parcel of land known as follows, the East half of survey No. 175 of G. A. Thompson Headright Certificate known as follows, commencing at the S. E. corner of Survey No. 175.

Thence N. 1900 vrs, to a stake from which a pine brs. S. 89 E. 7 vrs. a red oak brs. N. 61 88/20 vrs.;

Thence W. 950 vrs.;

Thence South 1900 vrs.;

Thence E. to the beginning containing three hundred and twenty acres of land, more or less.

To have and to hold the same unto the said Alexander Rogers his heirs and assigns forever, and I do hereby bind myself, my heirs, administrators, executors, and assigns, to warrant and defend the same to Alexander Rogers, his heirs and assigns, to warrant and defend the same to Alexander Rogers his heirs and assigns forever.

In testimony whereof I hereunto set my hand addixing a scroll for a seal this April 2nd, A. D. 1855.

A. MOSLEY. (Seal)

Test:

ELIZABETH BARNES,
E. L. DODSON."

(Acknowledgment.)

107 Counsel for Complainant:
We offer in evidence EXHIBIT No. 5.

The Court:
The exhibit is admitted in evidence and is in words and figures as follows:

"Warranty Deed.

"A. Rogers to Louisa Rogers.

Dated: Sept. 6, 1882.

Filed: Sept. 7, 1882.

Recorded: Vol. G, page 78, Deed Records, Gregg County, Texas.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, Alexander Rogers, of the State and County aforesaid, for and in con-

sideration that I *bar* towards my wife Louisa Rogers, do hereby grant and convey to the said Louisa Rogers, her heirs and assigns, a certain tract or parcel of land known as follows:

The East half of survey No. 175 of G. A. Thomason's headright certificate known as follows:

Commencing at the S. E. corner of Survey No. 175;

Thence N. 1900 vrs. to a stake from which a pine brs. S. 89 deg. E. 7 vrs. a red oak brs. N. 61 deg. E. 8 8/10 vrs.;

Thence W. 950 vrs.;

Thence South 1900 vrs.;

Thence East to the beginning, containing three hundred and twenty acres of land, more or less.

To hav- and to hold the same unto the said Louisa Rogers, her heirs and assigns forever, and I do hereby bind myself to warrant and defend the same to Louisa Rogers, her heirs and assigns forever, one hundred acres of the said three hundred and twenty acres was given Louisa Rogers by her father the dead being made to me. I now releas- all clames to the said one hundred acres, the said three hundred and twenty acres being situated in Gregg County, Texas.

In testimony whereof I hereunto set my hand affixing a scroll for a seal this September 6th, A. D. 1882.

A. ROGERS. (Seal)

Test:

J. W. ROGERS,
W. H. ROGERS."

(Acknowledgment.)

108 Counsel for Complainant:

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Warranty Deed.

"W. H. Rogers, et al., to J. F. Rogers.

Dated February 28, 1899.

Filed February 10, 1900.

Recorded in Vol. "R," p. 59, Deed Records of Gregg Co., Tex.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, J. W. Rogers, W. H. Rogers and F. E. Rogers of the State and County aforesaid, do this day for and in consideration of fifty dollars in hand, the receipt whereof is hereby acknowledged, do sell, deliver and convey unto J. F. Rogers of the State and County above mentioned, the following described tract or parcel of ....., to-wit:

Being a part of the G. A. Thomas Headright Survey, starting at the N. E. corner of Lot No. 2, which is the N. W. corner of the W. H. Rogers tract, Lot 1;

Running West 440 yards to Wiley Davis N. E. corner; thence South 880 yards; thence East 224 yards; thence North 310 yards at *12 deg* East of North;

Thence East 754 yards to W. H. Rogers line;

Thence North 572 yards to starting point containing 68 1/5 acres, more or less, with all the improvements thereon, the title to said land warrant and defend unto said J. F. Rogers, his heirs and assigns forever binding myself, my heirs, assigns and legal representatives to do the same.

In testimony whereof we hereunto sign our names in the presents of the attesting Notary Public on this the 28th day of Feby., A. D. 1899.

W. H. ROGERS,
F. E. ROGERS,
J. W. ROGERS."

(Acknowledgment.)

109. Counsel for Complainant:

"It is agreed that the call running East along the South side of this tract involved should be 154 yards instead of 754 yards as indicated in the abstract."

Counsel for Complainant:

We offer in evidence EXHIBIT No. 7.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Instrument: Deed.

"Parties: J. F. Rogers, et al., to W. H. Rogers.

Dated: February 28th, 1899.

Filed: July 10th, 1915.

Recorded: Vol. 29, page 559, Deed Records, Gregg County, Texas.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, J. F. Rogers, J. W. Rogers and F. E. Rogers, of the State and County aforesaid, for and in consideration of Fifty Dollars in hand, the receipt whereof is hereby acknowledged, do this day bargain, sell and convey all interest in the following described tract or parcel of land, unto W. H. Rogers, of the same state and county, to-wit:

Starting at the N. E. corner of the Rogers tract, running South 880 yards;

Thence West 374 yards;

Thence North 308 yards;

Thence West 66 yards;

Thence North 572 yards;

Thence East 440 yards to starting point, containing 75 4/5 acres, more or less,

With all the improvements thereon, in the G. A. Thomasons Headright Survey, the title to said land I warrant and defend unto said W. H. Rogers, his heirs, assigns, forever—binding myself, my heirs and assigns and legal representatives to the same.

In testimony whereof, we hereunto sign our names in the presence of the attesting witnesses, as Notary Public, on this the 28th day of Feby., A. D. 1899.

J. F. ROGERS,
110 F. E. ROGERS,
J. W. ROGERS."

(Acknowledgment.)

(Direct Examination Resumed.)

By Counsel for Complainant:

"In making the survey I had the field notes in the deed to J. W. and F. E. Rogers and had an abstract on such tract of land."

Counsel for Complainant:

We offer in evidence EXHIBIT No. 8.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Deed.

"J. F. Rogers, et al., to J. W. Rogers, et al.

Dated: February 28th, 1899.

Filed: December 18th, 1900.

Recorded: Vol. R, page 504-5, Deed Records of Gregg County, Texas.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, J. T. Rogers, and W. H. Rogers, of the State of Texas and County aforesaid, for and in consideration of one hundred dollars in hand, the receipt whereof is hereby acknowledged, do this day bargain, sell and deliver unto J. W. and F. E.

Rogers my interest in the following described tract or parcel of -and, being situated in the same state and county above mentioned, to-wit:

Being a part of the G. A. Thomas Headright Survey No. 175, starting at the S. E. corner of the Rogers tract running North 880 yards;

Thence West 374 yards;

Thence North 308 yards;

Thence West 220 yards;

Thence South 310 yards at 12 deg. West of South;

Thence West 224 yards;

Thence South 880 yards;

111 Thence East 880 yards to starting point, containing 176 acres more or less, ——, the title to said land, I warrant and defend unto the said J. W. and E. F. Rogers, their heirs and assigns forever, binding myself, my heirs and legal representatives to do the same in testimony whereof we hereunto sign our names in the presents of the attesting Notary Public, on this, the 28th day of Feby., 1899.

J. F. ROGERS,
W. H. ROGERS."

(Acknowledgment.)

(Direct Examination Resumed.)

By Counsel for Complainant:

"In locating the J. F. Rogers tract, after I had failed to find anything original or very old and there being no bearing trees nor natural objects called for in the description of the J. F. Rogers tract in the partition, I made a search to try and locate the line between the East half and the West half of the survey. On the South line, as used for the Thomason Survey, I found a post oak, which

is a very old marked tree, probably established forty or fifty years ago. The post oak is located at the Southwest corner of the East half of the Thomason Survey. This post oak tree is called for in the deed from J. H. Simmons to M. O. Sheppard. J. H. Simmons was the County Surveyor in Gregg County and I have been told he is dead.

From this post oak, marked X on the North side, there are old blazes on the North side, East side, South side and West side. That post oak is called for in the deed from Simmons to Sheppard in 1902. From that post oak I ran North along parts of an old fence, now mostly down, and also along an old marked line until I came to a pine knot, with a small iron rod beside it, from which
112 a 15 inch red oak marked X bears South 43 West 5-6/10 varas. That red oak was called for in the deed from Simmons to Sheppard. The mark was similar to that on the post oak at the Southeast corner, although I do not think the mark is as old that on the post oak at the Southeast corner of the Sheppard tract."

Counsel for Complainant:

We offer in evidence EXHIBIT No. 9.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Warranty Deed.

"J. H. Simmons et ux to Mrs. M. O. Sheppard.

Dated May 27, 1902.

Filed: May 18, 1903.

Recorded: Vol. T, p. 542, Deed Records, Gregg County, Tex.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, J. H. Simmons and wife, J. A. Simmons, nee Bozeman, of the same State & County aforesaid, for and in consideration of One Hundred & Forty Four Dollars $144.00 cash in hand the receipt whereof is hereby acknowledged do this day bargain, sell, transfer and deliver unto Mrs. M. O. Sheppard of the same State and County above mentioned the following described tract or parcel of land, to-wit:

Being situated about 2 miles East of Gladewater in the State and County of Gregg and being a part of the G. A. Thomason H. R. S. as follows:

Beginning about 305 V. East of S. W. C. of the Thomas Survey which is C. I. witness trees sweet gum S. 55 deg. E. 6-3/5 v. & a red oak N. 51 deg. W. 10 V.;

Thence North across the T. P. C. Railroad 330 V. to C. 2 post oak N 55 deg. E. 7-1/5 V. & a sweet gum N. 50 deg. W. 7 V.;

Thence E. 645 V. to C. 3 Red Oak S. 43 Deg. W. 5-3/5 V. & a red oak S. 6 deg. W. 9-4/5 V.;

Thence South 324 V. to C. 4 Post Oak for corner & a post oak N. 14 deg. E. 7 V.;

113 Thence West 645 V. to place of beginning, containing 37-2/3 acres less 1-2/3 acres for right-way of railroad amount deeded 36 acres, the title to said land I warrant and defend unto said Sheppard his heirs & assigns forever, binding myself my heirs & assigns to do the same, it is further agreed that this sale is not to interfere with the lease to Rucker Munzesheimer Lumber Company.

In testimony whereof I hereunto sign my name in the presents of the attesting witness on this the 27" day of May, 1902.

J. H. SIMMONS,
J. A. SIMMONS."

(Acknowledgment.)

Counsel for Defendants:

"We agree that the red oak tree marks the Northeast corner of the M. O. Sheppard 36 acre tract."

(Direct Examination Resumed.)

By Counsel for Complainant:

"We ran a line from the corner witnessed by the red oak, North, running partly with an old road and partly along a fence. The fence is not straight nor is the road straight. There was a fence to the West of the line we ran and there was also a fence in places to the East of the line we ran. The location of the fence is shown on the map (Exhibit No. 14). We ran that line North to about the North line of the Thomason Survey as the North line is used. In running the line North we crossed the Gladewater-Longview public road. The road is shown on the map (Exhibit No. 14) being the diagonal line separating the Clark tract on the North from the Haynes tract on the South.

We used that line to determine the East line of the Wiley Davis tract. There were no fences along the East line of the Wiley Davis tract (now G. W. Clark)
114 the line being in a road. The line has been in the road ever since I have known it. The road had been recently graded and is a country road, approximately sixty feet wide.

There was a call in the partition deed to J. F. Rogers for the Northeast corner of the Wiley Davis tract. The line run as described, was used as the East line of the

Wiley Davis tract (now G. W. Clark land). The call in the partition deed to J. F. Rogers was to begin at the Northeast corner of Tract Uo. 2 (J. F. Rogers tract), the Northwest corner of a tract No. 1 (W. H. Rogers tract). We located the Northwest corner of the W. H. Rogers tract as being at an iron in an old road as called for in the deed from W. H. Rogers to Mrs. E. L. Walker in 1910. That is the iron rod that is in the line of the fence to the South and in the road.

If the line of the fence running from the South were projected North it would miss the iron rod at the Northwest corner of the W. H. Rogers tract about a vara. The deed from W. H. Rogers to Mrs. E. L. Walker calls for the iron rod and the rod is about 1 vara West of the line of the fence to the South. I found a 2 inch iron pipe now driven around the rod.

Counsel for Complainant:

We offer in evidence EXHIBIT No. 10.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

115 "Deed.

"W. H. Rogers, et al., to Mrs. E. L. Walker.

Dated: November 23, 1910.

Filed: November 26, 1910.

Recorded: Vol X, page 278, Deed Records, Gregg County, Texas.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That we, W. H. Rodgers and wife, Lizzie Rodgers, and W. A. Wright of

the County of Gregg, State of Texas, for and in consideration of the sum of Seventy-five dollars, paid by Mrs. E. L. Walker, out of her own individual and private estate, receipt of which is hereby acknowledged, have granted, sold and conveyed, and by these presents do grant, sell and convey, unto the said Mrs. E. L. Walker of the County of Gregg, State of Texas, all that certain tract or parcel of land, situated in the county of Gregg, State of Texas, to-wit:

Being a part of the G. A. Thompson Survey and beginning at a stake in west line of the old Merrill tract;

Thence West 487 varas to an iron stake at corner of a field;

Thence North 298 varas to a stake, an iron in an old road;

Thence East 487 varas to a stake in west line of aforesaid Merrill tract;

Thence South 298 varas to place of beginning, containing in all 25.68 acres of land.

To have and to hold the above described premises, together with all and singular the rights, and appurtenances thereto in anywise belonging, unto the said Mrs. E. L. Walker and heirs and assigns, forever; and we do hereby bind ourselves, heir, executors and administrators, to warrant and forever defend, all and singular the said premises unto the said Mrs. E. L. Walker, heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands, at Gladewater, this 23rd day of November, A. D. 1910.

W. H. ROGERS,
LIZZIE ROGERS,
W. A. WRIGHT."

(Acknowledgments.)

116 (Direct Examination Resumed.)

By Counsel for Complainant:

"I will trace and show you the location on the map of the tract of land described in the deed from W. H. Rogers, et al., to Mrs. E. L. Walker. The deed calls 'beginning at a stake in West line of the old Merrill tract.' I started there and the next call is 'thence West 487 varas to an iron stake at corner of a field.' I did not measure that line but I measured the North line of the tract and not the South line and that is the South line.

I did not find the stake at the Southwest corner but I found the field. There is a small drain at the Southwest corner where water runs through at about the fence corner. The next call is 'thence North 298 vrs. to a stake, an iron in an old road.' That iron is a stake with the pipe around it that I previously testified to. The next call is 'thence East 487 vrs. to a stake in West line of aforesaid Merrill tract,' and I measured that line. That line by actual measurement is 486 plus vrs. and I have indicated that in red pencil on the map.

The called distance is 487 varas in the deed from W. H. Rogers, et al., to Mrs. E. L. Walker, while the call in the deed from J. F. Rogers, et al., to W. H. Rogers, is 440 yards, thereby making the call in the deed executed in 1910 by W. H. Rogers, et al., to Mrs. E. L. Walker, about 12 varas longer than the partition deed to W. H. Rogers. I found at the Northeast corner of the tract described in the deed from W. H. Rogers to Mrs. E. L. Walker, a fence on the South and a fence to the West. The fence corners

117 where I located the corner on the map. I found at the Southeast corner a fence to the West. The twenty-five acres is fenced but the fence is not in good repair at this time and a part of the North line does not have a fence on it. Part of the North line is in a lane."

Counsel for Complainant:

We offer in evidence EXHIBIT No. 11.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Deed.

"E. L. Walker to J. W. Mings.

Dated: November 25th, 1910.

Filed: November 26th, 1910, 10:00 AM.

Recorded: Vol. X, page 278 D/R Gregg County, Texas.

Filed No. 15134.

The State of Texas,
County of Gregg.
Know All Men by these Presents:

That we, E. L. Walker and wife, Mrs. Nannie E. Walker, of the County of Gregg, State of Texas, for and in consideration of the sum of one hundred and ..... 125.00 Dollars to be paid and secured to be paid, by J. W. Mings, as follows:

Twenty-five $25.00 Dollars in hand paid cash and the execution of two (2) promissory notes bearing even date with this deed and due as follows: 1st note due the 1st day of November, A. D. 1911, 2nd note due the 1st day of November, A. D. 1912, for fifty dollars each with interest at the rate of ten (10) per cent per annum from date until paid, the receipt of which is hereby acknowledged, have granted, sold and conveyed, and by these presents, do grant, sell, convey unto the said J. W. Mings, of the County of Gregg, State of Texas, all that certain tract of land situated in the County of Gregg, State of

Texas, all that certain tract or parcel of land, situated in the County of Gregg, State of Texas, to-wit: Being a part of the Thomason Survey, and

Beginning at a stake in the West line of the old Merrill tract;

118 Thence West 487 vrs. to an iron stake at corner of a field;

Thence North 298 vrs. to a stake an iron pipe in an old road;

Thence East 487 vrs. to a stake in West line of aforesaid Merrill tract;

Thence South 298 vrs. to place of beginning, containing in all 25 68/100 acres of land.

To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said Mings and heirs and assigns forever; and we do hereby bind ourselves, heirs, executors, and administrators to warrant and forever defend all and singular the said premises unto the said J. W. Mings, heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

But it is expressly agreed and stipulated that the vendor's lien is retained against the above described property, premises, and improvements, until the above described notes, and all interest thereon are fully paid according to their face, tenor and effect, and recorded when this deed shall become absolute.

Witness our hand at Gladewater, this 25th day of November, A. D. 1910.

E. L. WALKER, M. D.,
NANNIE E. WALKER."

(Acknowledgments.)

Counsel for Defendants:

"I think those are admissible for locative purposes, but being subsequent deeds by other parties, they would not be binding on my client. The partition was in 1899; and this deed he is offering was in 1910."

Counsel for Complainant:

"The deed from W. H. Rogers would certainly bind him, he being a defendant in this lawsuit, and one of the claimants to this strip of land."

Counsel for Defendants:

"If it conflicts with W. H. Rogers in any way; but I don't think so."

119 Counsel for Complainant:

We offer in evidence EXHIBIT No. 12.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

Instrument: Warranty Deed.

Parties:

J. W. Mings, et ux. to Mrs. L. J. Rogers, et al.

Dated: May 7th, 1917.

Filed: May 11th, 1917.

Recorded: Vol. 32, pgs. 572-3, Deed Records of Gregg County, Texas.

The State of Texas,
County of Harrison.
Know All Men by these Presents:

That we, J. W Mings and wife, Addie Mings, of the County of Harrison, State of Texas, for and in consideration of the sum of one dollar and other good and valuable considerations to us paid, by Mrs. L. J. Rogers, Elvie Waskom (nee Rogers), and J. E. Rogers, as follows:

Cash in hand paid and exchange of property which is hereby acknowledged, have granted, sold and conveyed, and by these presents do grant, sell, and convey, unto the said Mrs. L. J. Rogers, Elvie Waskom *(nee* Rogers) and J. E. Rogers, of the County of Gregg, State of Texas, all that certain tract or parcel of land on the G. A. Thomason Survey.

Beginning at the N. W. corner of a 25 68/100 acre tract conveyed to us by E. L. Walker and wife, Nannie E. Walker, by deed dated Nov. 25th, 1910, recorded in Vol. X, pages 278, 279 Gregg County, Texas.

Thence E. 118 feet and 3 inches to corner witness P. O. tree 24 in. diam. brs. N. about 80 deg. W. 27 feet,

Thence S. 828 feet to the S. B. line of original tract to corner,

Thence W. 118 feet 3 inches to the S. W. corner of original tract, an iron pipe for corner,

Thence N. 828 feet, to the place of beginning, containing two acres, more or less.

To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto, in anywise belonging, unto the said Mrs. L. J. Rogers, Elvie Waskom *(nee* Rogers), and J. E. Rogers, heirs and assigns forever, and we do hereby bind

ourselves, our heirs, executors and administra-
120 tors, to warrant and forever defend, all and singular the said premises unto the said Mrs. L. J. Rogers, Elvie Waskom and J. E. Rogers, their heirs and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

Witness our hands at Gladewater, this 7th day of May, A. D. 1917.

J. W. MINGS,
ADDIE MINGS."

(Acknowledgment.)

(Direct Examination Resumed.)

By Counsel for Complainant:

"I ran the North line of the tract described in the deed from J. W. Mings, et ux., to Mrs. L. J. Rogers, et al. There is a stump there that will meet the call for bearing tree when a line is run East of the line as described at the Northwest corner. The deed begins 'Northwest corner of a 25-68/100 acre tract conveyed to us by E. L. Walker and wife, Nannie E. Walker' and runs to a corner witnessed by a post oak. The stump I found was a post oak stump and it would meet the call running East from that iron stake I found. The next call is 'thence South 828 feet to the S. B. line of original tract to corner.' There was no fence running along the East line. The next call is 'thence West 118 feet 3 inches to the S. W. corner of original tract, an iron pipe for corner.' I did not find anything there other than evidence of possession and the fence corner. The fence runs about North and South and about East and West. The next call is 'thence North 828 feet to the place of beginning, containing 2 acres, more or less.' I measured that line and found it to be 298 vrs., which I have put on the map. That is 828 feet.

I have marked on the map the post oak stump where I found it.

121 I used that iron as described for the Northwest corner of the W. H. Rogers tract.

Mrs. L. J. Rogers sold to Mings in 1917 a two acre tract out of the Northwest corner of a 68-1/5 acre tract."

Counsel for Complainant:

We offer in evidence EXHIBIT No. 13.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Deed.

Mrs. L. J. Rogers to J. W. Mings.

Dated: May 7, 1917.

Filed: May 10, 1917.

Recorded: Vol. 32, page 563, Deed Records, Gregg County Texas.

The State of Texas,
County of .....
Know All Men by these Presents:

That we, Mrs. L. J. Rogers, wife of J. F. Rogers, dec'd, Elvie Waskon (nee Rogers) daughter of J. F. Rogers, deceased, and J. E. Rogers, a son of J. F. Rogers, deceased, all the heirs at law of J. F. Rogers, deceased, of the County of Gregg, State of Texas, for and in consideration of the sum of One ($1.00) Dollar, and the exchange of property to us paid by J. W. Mings, as follows:

One ($1.00) Dollar cash in hand paid the receipt of which is hereby acknowledged, also the exchange of property this day made is acknowledged, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said J. W. Mings, of the county of Harrison, State of Texas, all that certain tract or parcel of land, being a part of the G. A. Thomason H. R. Survey and described as follows, to-wit:

Beginning at the NW corner of our 68 acre tract, said beginning corner is about 953 vrs. West of the NE. corner of said G. A. Thomason H. R. survey;

Thence East 147 feet to corner on the N. B. line of G. A. Thomason survey, witness PO. tree about 12 in. dia. brs. W. 5 feet;

Thence South with fence 757 feet to corner, said corner being 21 feet SE. of SE. corner of residence;

Thence West 115 feet to E. side of Union Grove Public Road, witness B. J. tree brs. N. about 10 deg. East 75 feet;

122 Thence (North) with meanderings of said road to the place of beginning, containing about two acres of land, more or less. Said tract of land being situated in Gregg County, Texas.

To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said J. W. Mings, his heirs and assigns forever, and we do hereby bind ourselves, our heirs, executors, and administrators to warrant and forever defend, all and singular the said premises unto the said J. W. Mings, his heirs and assigns,

against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands at Gladewater, this 7th day of May, A. D. 1917.

MRS. L. J. ROGERS,
J. E. ROGERS,
AZZIE WASKOM,
ELVIE WASKOM."

(Acknowledgments.)

(Direct Examination Resumed.)

By Counsel for Complainant:

"I attempted to locate the two acre tract described in the deed from Mrs. L. J. Rogers to Mings. In locating this tract I found a bearing tree near the Northeast corner of the two acre tract which I took for the bearing tree called for in the deed. The tree is marked X on the East side and is a post oak. It was about 16 inches in size and if the deed called for a 12 inch post oak in 1917, in my opinion, the 16 inch tree I found would have been about 12 inches in 1917. From the appearance of the marks, my judgment is that the post oak that I found is the tree called for in the deed.

I did not find anything at the Northwest corner of the tract, the corner being in the road. When I was there the road was about 60 feet wide and it was a well graveled and muchly traveled road at that time. It had been graded recently but I would not say it had been recently graveled. The post oak tree is shown on the map.

123 I did not run around that tract but I ran the North line, the West line and the South line of it. I found a fence along the East line of the two acre tract. The deed calls for a fence as the East line, the call being 'thence South with fence 757 feet to corner.' I made the North line of the 2 acre tract the called distance. I used the corner witnessed by the bearing tree

to locate the North line and ran West the called distance of 147 feet, which would fall in the edge of the road.

On the Southeast corner of the 2 acre tract is an iron and a pipe also, I believe. There was a residence there at that time and the deed calls 'said corner being 21 feet Southeast of Southeast corner of residence.' It further calls 'thence West 115 feet to East side of Union Grove Public Road, witness B. J. tree, brs. North about 10 degrees East 75 feet.' I did not find that black jack but the 115 feet would be about the East edge of the traveled portion of the road. There was no fence corner at the Southeast corner of the 2 acre tract, there being no fence to the West. There was no fence on the South side of the 2 acre tract."

Counsel for Complainant and Defendants:

"It is agreed that the two acre tract was conveyed by Mings to Akin, and from Akin to George Clark; and Akin leased it; and the lease is now owned by the Sun Oil Company."

(Direct Examination Resumed.)

By Counsel for Complainant:

"We used that corner for the Northeast corner."

Counsel for Defendants:

"I am not agreeing to the location as placed by the Engineer, but only that the conveyances were made."

124 (Direct Examination Resumed.)

By Counsel for Complainant:

"From the Northeast corner of the 2 acre tract, as witnessed by the post oak, we ran the called distance along the North line (147 feet). We found that the point was about 3 varas East of a line we had run North from the Northeast corner of the M. O. Sheppard 36 acre tract. When a line is run West from the Northeast corner of

the 2 acre tract, as witnessed by the post oak bearing tree, West 5 feet, the called distance of 147 feet for the North line of the 2 acre tract, the Northwest corner of the 2 acre tract is located at a point in the edge of the road. There is a ditch along the side of the road, the ditch being between the traveled part of the road and the right of way fence. The distance of 147 feet took me into the ditch on the West edge of said ditch between the East edge of the road and the ditch. That point was 3 vrs. or 8½ feet, East of the line which I had run North from the Northeast corner of the M. O. Sheppard 36 acre tract. I used a line run from the Northeast corner of the Sheppard tract to the point 147 feet West of the point witnessed by the post oak as the West line of the J. F. Rogers 68-1/5 acre tract. I corrected my variations North, making a change of about five seconds and thereafter used such line as the North line. I did not calculate the acreage but the acreage used is merely descriptive.

I used the Northwest corner of the W. H. Rogers tract as the Northeast corner of the J. F. Rogers tract.

The distance from the Northwest corner of the J. F. Rogers tract to the Northeast corner of said tract at the iron pipe, as I had previously located it, is 495.4 vrs., which I have put on the map. That line is about
125 20 vrs. long over the call of 440 yards, which is 475 varas. There is a difference of about 20 varas.

I did not find anything at the Southwest corner of the J. F. Rogers tract in locating it as I have done. There is a country road running North along the J. F. Rogers tract from the Gladewater-Longview Highway. There was a fence as I recall at that time on the West side of the road, along the Clark tract. South of the Gladewater-Longview Highway along the West side of the J. F. Rogers tract, as I have located it, there was a fence West of the line which I ran South, which varied from ten to fifteen feet West of the line. There were parts of a fence East of the West line of the J. F. Rogers tract, as I ran it, and they are shown on the map. The fence

on the West of the line I ran is in the J. M. Haynes field. On the East of the line I ran is wire grown into the trees, as shown on the map. There were remains of a fence North that I noticed, but the fence was very crooked. The fence would have been East of the double dotted line I have shown for an old roadway. There was an old road along there but I cannot say how far the fence would have been from the Haynes field. It varied.

I located the South line of the Rogers tract and found a fence that has been used as the South line of said tract. Running East from the Southwest corner, as I have located it on the map (Exhibit No. 14) I went 278.3 varas along a fence. There was an old pine tree used as a fence corner, from which a fence runs generally Northwest.

126 There was a fence and evidence of a fence along the South line of the tract as I ran the South line but all the fence was not standing. The call is 224 yards, which would be 248 varas and I ran 278 varas, which would be 36 varas difference. I found at the Southeast corner where I stopped, a fence corner where an old fence partly down and partly up ran a little East and North. There was no fence running to the East or South there but there was a fence running back West.

I continued that line on to the East line of the Thomason Survey. I found there a pine knot with a small iron rod beside it and red oak bearing tree. The bearing tree was marked X but it was not called for in any field notes that I found. It was an old X.

We had left a point for approximately the Southwest corner of the W. H. Rogers tract, which is indicated on Exhibit No. 14, as "A". From that point we ran North across the Gladewater-Longview roadway. That point marked "A" is 404 varas West from the tree and a pine knot on the East line of the Thomason Survey just mentioned. The call in the partition deed to W. H. Rogers is 374 yards, which is 403-9/10 varas. I have marked the agreed Southeast corner of the W. H. Rogers tract with the letter "B" and the distance to point "A" is 404 varas.

From "A" we ran North 334 varas, which I put on the map. 334 varas is 309 yards and the call is 308 yards or 332-6/10 varas. That is about a yard and a foot longer than the call in the partition deed to W. H. Rogers but I found at that corner evidence of an old fence, there being wire grown in trees South of the highway. I have no note of any fence South of the highway. I found a fence North of the highway, some of the fence being old and some new. I have indicated the highway
127 with the letter "C". The fence North of the highway appeared to be an old fence. I stopped at 309 yards because that was approximately the called distance and I found at 309 yards a fence corner and a fence to the West and to the South. From there we ran over West to the line of the fence to the North a distance of 71 vrs. and the call is 66 yards which, converted into varas, is 71-3/10 varas. At that point I found a fence going to the North, which fence was a continuation of the fence along the West line of the two acre tract in the Northwest part of the Walker 25 acre tract. From that point there was a fence running approximately West. I found at the fence corner one-half inch iron rod in the line of the fence to the North and in the East and West fence, there was a 2 inch pipe 1½ vrs. North and 2 vrs. West of the iron rod. I ran later North along the East line of the J. F. Rogers 68 acre tract.

I ran a line West along a fence from the point 71 varas from where I had first turned West. The fence was an old one but some of it looked new and there were improvements in there. Houses and such are there but I cannot say how old the fence was. I ran the called distance of 154 yards. The fence is not running straight. From point D on Exhibit 14 I ran a line South 12 degrees West."

(Examination of Witness.)

By the Court:

"From where the two fences joined the North side of the 16 acre tract, I went West the called distance. That

did not bring me to anything exactly. The fence bends and it is crooked and it is not run out to any point.

From that point D running South 12 degrees
128 West, we found a fence that generally was near the line but not on the line. The fence was West of the line."

(Direct Examination Resumed.)

By Counsel for Complainant:

"We ran out to point D and on down South to see if the land was generally in possession or if there was evidence of possession. I ran the line as stated above and found there was a fence running generally along it but not exactly on the line. The fence was crooked and I have not figured out exactly how it would vary but it would cross the line part of the time and part of the time it would be West of the line and part of the time it would be East of the line. The fence did not approximate the line I ran but to generally follow the line of the fence it would take a course of about South 12½ degrees West, instead of South 12 degrees West. When I ran to point E, I made a connection to the fence corner down there. We then investigated in the Western part of the Thomason Survey to see if we might find any of the corners called for in the various deeds. At point D shown on the map I was North of the fence, as I recall. The fence cuts across the corner there and it is generally in line with the fence to the South. From point D, that is the fence I have spoken of as running on toward the Southwest that would have crossed the line. The line finally ended up at the fence corner for the Southeast corner of the J. F. Rogers tract, which I have marked on the map as point E.

I then ran the East line of the J. F. Rogers tract. There is a fence generally along the east line. I do not think the length of the East line. I would not say positively

that I actually measured it. I do not show it in
129 my notes. I know I ran a line to it but I won't say I measured it. I went from the Northeast

corner of the J. F. Rogers tract to the Wiley Davis tract (now G. W. Clark tract) and tried to locate the Wiley Davis tract because in the partition deed to J. F. Rogers the Northwest corner of the Rogers tract called for the Northeast corner of the Wiley Davis.

In locating the Wiley Davis Northeast corner I made quite a search and investigation of tracts and corners called for in deeds to the West half of the Thomason Survey. In making the investigation I had the field notes of the Bozeman partition made in 1891 and the other deeds I have indicated on my map (Exhibit No. 14). The calls in the partition deed and the other deeds are shown on my map. We found the bearing trees at the Northeast corner of the Sheppard 36 acre tract called for in the Bozeman partition deed and we found those corners in the deed from Simmons to Sheppard. Outside of those bearing trees I found none in the West one-half in trying to locate the Davis tract. We searched all the lines shown on the map."

Counsel for Complainant:

We offer in evidence map which has been marked Exhibit No. 14.

The Court:

The map is admitted in evidence, and is reproduced at the end of this statement of evidence.

(Direct Examination Resumed.)

By Counsel for Complainant:

"I have testified how I have located the Wiley Davis tract. There was no call at the Southwest corner of the Wiley Davis tract except for the road. I did not make a positive determination of the West line of the Davis tract. I made search in the vicinity for what-
130 ever there might be, bearing trees and such things, called for in the deed. I did not find the bearing trees called for at the Northwest corner in the

Wiley Davis deed. At the Northwest corner of the Wiley Davis tract (G. W. Clark tract) there is a road running from the South that makes a slight bend to the left to run a little to the Northwest and the road is about in line of an old road to the West and a line of a lane to the East. Taking the W. H. Rogers tract No. 1 and running around it, as I have located it on the ground, the tract would be excessive East and West on the North line. I find no appreciable excess in the South line of the W. H. Rogers tract No. 1, as I have located it. I find that the distance, as I have located the J. F. Rogers tract No. 2 from the most Northerly Southeast corner at point D to the most Southerly Southeast corner at point E, approximated the calls in the deed. As I have located it, the tract on the ground has an excess of around 36 yrs. from the most Southerly Southeast corner to the Southwest corner of the said J. F. Rogers tract.

In my opinion that is the way to reconstruct the survey, not being able to find any monuments on that South line.

Cross Examination.

Counsel for Defendants:

"We agree, on behalf of defendants, that at point B the red oak tree marks the East line of the Thomason Survey, which therefore makes no dispute about the Northeast corner as the witness locates it nor the Southeast corner as he locates it."

131 By Counsel for Complainant:

"Beginning at point B and running to point A there is practically no excess. Running from point A for the next call there is practically no excess, being 334 yrs. as located on the ground as against 332 yrs. as contained in the call. In the next call of 71 yrs. there is only a foot or two difference between the call and the line as I have located it on the ground, which is nothing to amount to anything. The next call over to D of 154 yrs., as I have located the line on the ground is about the same as the

call. From D, going South to E, there is no appreciable difference between the call and the distance of the line as I have located it. The difference begins when I go down to E and instead of going 224 yards as is called for in the field notes, I ran 278.3 vrs. I had the deed from Rogers to Burnett on the South. That call is for 224 yards here. The deed from Burnett to King and from King to Shell Petroleum Company also contains a call for 224 yards. The 224 yards will take one to the bevel gear there in the edge of the old road.

I know where the Simmons well is located and I have marked it on the map. As marked on the ground, the well is East of the heavy line I have shown and East of the fence and East of the old road.

At your request I have marked on the map a line beginning at the bevel gear and going down approximately where the old road makes the West line of the Alco Ryan 10 acre lease, as the lease is established on the ground. Also, from the bevel gear I have dotted a line to where I show the fence. That line shows the connec-
132 tion and the fence goes on down South and wanders around to the West. In going from the Northwest corner of tract No. 1, as I show the corner to be located on the ground, and running West 440 yards (475 varas), I have marked on Exhibit 14, with a blue line and an X above the line said point. From a point 440 yards West of the Northwest corner of tract No. 1, I took a connection to the bevel gear. I measured the distance to the bevel gear but not on that particular line. The difference between 475 varas (440 yards) and 495.4 varas is 20.4 vrs., which is less than a chain. A chain is 26-3/4 varas, or 66 feet. A vara is 2.78 feet.

As I have located the West line of the J. F. Rogers tract it is 34.3 varas West of the bevel gear, which is about 95 feet. I make it 95 feet from the bevel gear to the line of the Bozeman tract (now the Haynes tract). I know that the Haynes tract calls to run North from the Northeast corner of the M. O. Sheppard 36 acre tract. The Haynes fence is not directly on a line run North from

the M. O. Sheppard tract. I have the fence on the map as I found it. The dotted line represents the roadway as it has been traveled and the line with crosses represents the fences. There is a well located East of the heavy line but I do not find a fence East of the well that you speak of. I find parts of a fence. I have shown the fence on Exhibit 14. There is a well West of where I have shown part of the fence and East of the Haynes fence.

There is another well up North, called the Phillips well, which is East of the Haynes fence and in the road.

133 There are no dimensions on Exhibit No. 14 showing the result of an actual survey except such dimensions as have been placed on the map with red pencil. The dimensions shown on the map are the called distance.

I measured the Bozeman tract, having measured enough to make a search in the approximate locality for the location of the corner.

On Exhibit No. 14, I showed the call from the Northeast corner of Tract No. 1 to the Northwest corner of Tract No. 2, to be 487 varas, whereas the call in the field notes is 440 yards, or about 475 varas. I showed on the map the distance from the Northeast corner of tract No. 2 to the Northwest corner of tract No. 2 to be 495.4 varas, while the call in the deed is 440 yards or 475 varas. The distance shown from the actual survey does not correspond with the distances called for in the deed.

As I locate the East one-half of the survey, as called for in the patent, the North and South lines are more than 950 varas. The East one-half of the survey, as the distance is called for in the patent would be 950 varas on the North and South lines. I ran all of the lines of the survey but did not find any bearing trees at the Southwest corner. I did not establish the Southwest corner of the survey to be a fence, as I stated in the beginning of my testimony, the corners were located by evidence of usage, fences and possession and recognition of the lines.

I find no evidence showing that the Rogers' fence has ever been West of the gear wheel to the North. I find

no evidence of the Rogers fence going to the gear wheel.

134 My map does include the land West of where I found evidence of a fence as being within the Rogers tract. I could not say that it is true that the fence on the Rogers tract from the gear wheel North has left out a roadway 66 feet wide. I found a fence West of the road which is the Haynes fence. There is a fence that makes the East line of the Haynes tract and there is, as I recall, some fencing over on the West.

Q. And all of that fencing is East or runs approximately along straight from the gear wheel North, or a little bit West of the gear wheel North.

A. That is right."

(Examination of Witness.)

By the Court:

"From the gear wheel to point E, as I have located it on the ground, the distance is 247 varas, which is about 5 varas in excess of the called distance, if I accept the gear wheel as a corner and run the called distance of 224 yards (242 varas). The distance of 278.3 varas in red on the map is not from the gear shaft to point E but is from the West line, as I have located it. The distance of 278.3 varas is greater than the called distance of 224 yards by 36 varas."

(Cross Examination Resumed.)

By Counsel for Defendants:

"I have at your request indicated on Exhibit No. 14 a point 224 yards East of where I established the Southwest corner of the Rogers tract, which point is 242 vrs. East of point I have established as the Southwest corner. At your request I have run a line on the map from said point North 12 degrees East 310 yards. The next call in the partition deed to J. F. Rogers is East 154 yards. That

call would go from D as marked by that line to the W. H. Rogers West line.

135 From the work done on the ground, it clearly shows there is an excess distance in the North line. If a line is run West from the Northeast corner of the J. F. Rogers tract, as I have located it by the iron at the fence, to the Northwest corner of the J. F. Rogers 68-1/5 acre tract, as I have located it, there is an excess of about 20 varas. It is therefore evident that, by running the called distance I cannot get back to where I started. So I ran South from the Northwest corner of the 68-1/5 acre tract, as I had determined it, and ran the called distanee from the most Easterly Southeast corner of the tract and put the excess in the South line. We have possession along the East line of the J. F. Rogers tract as I have located it. The possession is from the line shown on Exhibit No. 14, DE. It is true that I followed possession in locating the East line of the tract but I did not follow possession in fixing the West line because I did not find possession in the form of a fence in the middle of the road. I found parts of a fence on the East side of the road.

Beginning at point B on Exhibit No. 14, the distance West, as I have located the line, is accurate with the call of the partition deed, the distance from point A on North likewise practically corresponds and the distance on the North is accurate. The distance to point D, running West, as I have located it, corresponds with the call of 154 yards and the distance from D to E, as I have located the line, corresponds with the called distance. All of the distances on the South line are approximately accurate with the distances in the deeds and 224 yards would approximately put the line at the gear wheel."

136 Counsel for Complainant:

"We object to any evidence concerning the gear wheel, because it is not called for in any title. I don't care to object to the testimony concerning that, except that it would have no weight."

The Court:

"What you are getting at is that he admits that the signs of possession, and all the distances called for along the South border are fairly accurate, and commensurate with the calls in the instruments of conveyance, except the last call on the South line to the West?"

Counsel for Defendants:

"Yes. And if you stop at 224 yards, you will be approximately in the old fence line, won't you?

Witness:

A. No, I don't find the old fence—"

The Court:

"What you mean is that if you extend a line North from that point 224 yards West of "E" that a fence extending along that line North will be fairly commensurate with the fence line that you find up there at the North; is that right?"

Counsel for Defendants:

"That is right. The fence he says he found on the South."

(Cross Examination Resumed.)

By Counsel for Defendants:

Q. Do you know where there is an old gear wheel in the road down there?

A. It is shown on the map."

137 Counsel for Complainant:

"May I have a general objection to all testimony concerning the gear wheel, as not being called for in any instrument in the whole record?"

(Cross Examination Resumed.)

By Counsel for Defendants:

If you came over 224 yards from "E", you would be close to where the old gear wheel is there?

A. Yes.

Q. And about some distance East of the point you have marked for the Southeast corner of the Empire lease?

A. Yes, of the Rogers tract."

(Examination of Witness.)

By the Court:

"Q. Didn't you testify that you found some evidences of an old fence, not at the point that you established as the Southeast corner of that 68 acre tract, not South of the bevel gear, but directly on up North and East of the line that you—

A. I showed two trees there, with wire grown into them.

The Court:

Q. "How did that point correspond with a line extended from there along to the bevel gear that you found on the ground?

A. Those trees would be some distance West of the bevel gear."

The Court:

"Q. How much West?

A. It would be an estimate."

138 The Court:

"Q. Well, what is your estimate?

A. Probably 15 varas. That is North of the bevel gear."

The Court:

"Q. That would leave you still approximately 20 varas East of what you have fixed as the Southwest corner of the 68 acre tract?

A. Yes."

Re-Direct Examination.

By Counsel for Complainant:

"In checking over the field notes and making a survey on the ground of the J. F. Rogers tract, there is a difference in the called dimensions in the partition deed, and the calls set up on the ground as I located them where I found they had been recognized.

When I started at point D and ran the calls going the ditance, I found no variance until I came to point E. If from point E I reversed the call and ran 224 yards West, I would not have been South of the Northwest corner of the J. F. Rogers tract No. 2, as I had located it on the ground. I would have had to go something over 30 varas further West to have been South of the Northwest corner of the J. F. Rogers Tract No. 2, as I had established it. In regard to the fence running North, the map shows three trees near the Southwest corner of the J. F. Rogers tract No. 2. I am sure there were parts of a fence North of there on the East side of the road; the fence was crooked and some of it was new and I made
139 no connection to it. I did not find any fence straight across up there and that is the reason I did not connect to it. I did not check the fence, therefore I cannot say whether there was any degree of accuracy of a line fence along there. I did find evidence of a fence in the trees as indicated at the Southwest corner on the map."

BEN E. RAMSEY, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Complainant:

"My name is Ben E. Ramsey and I am an engineer, having graduated in 1930 from the Kansas State College in Civil Engineering. Since graduation I have had experience in surveying and have worked in the East Texas field since 1930. I am employed at this time by R. G. Armstrong, a surveyor, at Longview. At one time I was employed by the Empire Gas & Fuel Company, running a survey party in the East Texas field for about a year. I came to East Texas March 1, 1931.

I surveyed the J. F. Rogers lease. Ben Leuty was my immediate superior. I had field notes of the Empire lease when I made the survey, which lease is marked Exhibit 15. Based on that lease I made a survey of the tract. Exhibit 16 is a map that was made from notes that I took in the field."

Counsel for Complainant:

"We offer in evidence EXHIBIT No. 15."

The Court:

"The exhibit is admitted in evidence and is in words and figures as follows:

140 "Oil and Gas Mineral Lease.

Filed Nov. 18, 1930; Recorded Vol. 61, p. 295, Deed Records, Gregg Co.

This Agreement, made this 20th day of October, 1930, between L. J. Rogers (a widow), J. E. Rogers, A. S.

Waskom and wife, Elvie Waskom, lessor, (whether one or more) and W. P. Chandler, lessee, Witnesseth:

1. Lessor in consideration of Ten & no/100 Dollars ($10.00) in hand paid, of the royalties herein provided, and the agreements of lessee herein contained, hereby grants, leases and lets exclusively unto lessee for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, laying pipe lines, building tanks, power stations, telephone lines and other structures thereon to produce, save, take care of, treat, transport, and own said products, and housing its employees, the following described land in Gregg County, Texas, to-wit: being a part of the G. A. Thomas H. R. Starting at the NE. cor. of Lot No. 2, which is the NW. cor. of W. H. Rogers Tract Lot No. 1 running West 440 yards to Wily Davis NE. corner; thence S. 880 yds.; thence East 224 yards; thence North 310 yard at 12° East of North; then East 754 yards to W. H. Rogers line; thence North 572 yards to starting point, containing 68-1/5 acres, more or less, and being the same land described in a deed from J. W. Rogers, W. H. Rogers and F. E. Rogers to J. F. Rogers, Feby. 28, 1899, rec. Vol. "R" p. 59-60 Deed Records of Gregg County, Texas, save and except 2 acres out of the NW. cor. sold to R. M. Wood, it being the intention to include all land owned or claimed by lessor in said surveys.

2. Subject to the other provisions herein contained, this lease shall be for a term of ten years from this date (called "Primary Term") and as long thereafter as oil, gas or other mineral is produced from said land hereunder.

3. The royalties to be paid by lessee are: (a) on oil, one-eighth of that produced and saved from said land, the same to be delivered at the wells or to the credit of lessor into the pipe line to which the wells may be connected; lessee may from time to time purchase any royalty oil

in its possession, paying the market price therefor prevailing for the field where produced on the date of purchase; (b) on gas, including casinghead gas or other gaseous substance, produced from said land and sold or used off the premises or in the manufacture of gasoline or other product therefrom, the market value at the well of one-eighth of the gas so sold or used, provided that on gas sold at the wells that royalty shall be one-eighth of the amount realized from such sale; where gas from a well producing gas only is not sold or used, lessee may pay as royalty $50.00 per well per year, and upon such payment it will be considered that gas is being produced within the meaning of Paragraph 2 hereof; and (c) on all other minerals mined and marketed, one-tenth, either in kind or value at the well or mine, at lessee's election, except that on sulphur the royalty shall be fifty cents (50) per long ton. Lessee shall have free use of oil, gas, coal, wood and water from lessor's wells, for all operations hereunder, and the royalty on oil, gas and coal shall be computed after deducting any so used. Lessor shall have the privilege at his risk and expense of
141 using gas from any gas well on said land for stoves and inside lights in the principal dwelling thereon out of any surplus gas not needed for operations hereunder.

4. If operations for drilling are not commenced on said land or before one year from this date the lease shall then terminate as to both parties, unless on or before such anniversary date lessee shall pay or tender to lessor or to the credit of lessor in Everett Banking Company Bank of Gladewater, Texas (which bank and its successors are lessor's agent and shall continue as the depository for all rentals payable hereunder regardless of changes in ownership of said land or the rentals) the sum of sixty six & 20/100 Dollars ($66.20) (herein called rental), which shall cover the privilege of deferring commencement of drilling operations for a period of twelve (12 months). In like manner and upon like

payments or tenders annually the commencement of drilling operations may be further deferred for successive periods of twelve (12) months each during the primary term. The payment or tender of rental may be made by the check or draft of lessee mailed or delivered to said bank on or before such date of payment. If such bank (or any successor bank), should fail, liquidate or be succeeded by another bank, or for any reason fail or refuse to accept rental, lessee shall not be held in default for failure to make such payment or tender of rental until thirty (30) days after lessor shall deliver to lessee a proper recordable instrument, naming another bank as agent to receive such payments or tenders. The down cash payment is consideration for this lease according to its terms and shall not be allocated as mere rental for a period. Lessee may at any time execute and deliver to lessor or to the depository above named or place of record a release or releases covering any portion or portions of the above described premises and thereby surrender this lease as to such portion or portions and be relieved of all obligations as to the acreage surrendered, and thereafter the rentals payable hereunder shall be reduced in the proportion that the acreage covered hereby is reduced by said release or releases.

5. If prior to the discovery of oil or gas on said land lessee should drill a dry hole or holes thereon, or if after discovery of oil or gas the production thereof should cease from any cause, this lease shall not terminate if lessee commences additional drilling or reworking operations within sixty (60) days thereafter or (if it be within the primary term) commences or resumes the payment or tender of rentals on or before the rental paying date next ensuing after the expiration of three months from date of completion of dry hole or cessation of production. If at the expiration of the primary term oil, gas or other mineral is not being produced on said land but lessee is then engaged in drilling or reworking operations thereon, the lease shall remain in force so long as operations are prosecuted with no cessation of more than

thirty (30) consecutive days, and if they result in the production of oil, gas or other mineral so long thereafter as oil, gas or other mineral is produced from said land. In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within one hundred fifty (150) feet of and draining the leased premises, lessee agrees to drill such offset wells as a reasonably prudent operator would drill under the same or similar circumstances.

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6. Lessee shall have the right at any time during or after the expiration of this lease to remove all property and fixtures placed by lessee on said land, including the right to draw and remove all casing. When required by lessor, lessee will bury all pipe lines below ordinary plow depth, and no well shall be drilled within two hundred (200) feet of any residence or barn now on said land without lessor's consent.

7. The rights of either party hereunder may be assigned in whole or in part and the provisions hereof shall extend to the heirs, successors and assigns, but no change or divisions in ownership of the land, rentals or royalties, however accomplished, shall operate to enlarge the obligations or diminish the rights of lessee. No sale or assignment by lessor shall be binding on lessee until lessee shall be furnished with a certified copy of recorded instrument evidencing same. In event of assignment of this lease as to a segregated portion of said land, the rentals payable hereunder shall be apportionable as between the several leasehold owners ratably according to the surface area of each, and default in rental payment by one shall not affect the rights of other leasehold owners hereunder. If six or more parties become entitled to royalty hereunder, lessee may withhold payment thereof unless and until furnished with a recordable instrument executed by all such parties designating an agent to receive payment for all.

8. The breach by lessee of any obligation arising hereunder shall not work a forfeiture or termination of this

lease nor cause a termination or reversion of the estate created hereby nor be grounds for cancellation hereof in whole or in part save as herein expressly provided, if the obligation for reasonable development should require the drilling of a well or wells, lessee shall have ninety (90) days after ultimate judicial ascertainment of the existence of such obligation within which to begin the drilling of a well, and the only penalty for failure to do so shall be the termination of this lease save as to ten (10) acres for each well being worked on and/or being drilled and/or producing oil or gas to be selected by lessee so that each 10-acre tract will embrace one such well.

9. Lessor hereby warrants and agrees to defend the title to said land and agrees that lessee at its option may discharge any tax, mortgage or other lien upon said land and in event lessee does so, it shall be subrogated to such lien with the right to enforce same and apply rentals and royalties accruing hereunder toward satisfying same. Without impairment of lessee's rights under the warranty in event of failure of title, it is agreed that if
143 lessor owns an interest in said land less than the entire fee simple estate, then the bonus, royalties and rentals to be paid lessor shall be reduced proportionately.

In Witness Whereof, this instrument is executed on the date first above written.

her
L. J. X ROGERS,
mark
J. E. ROGERS,
A. S. WASKOM, (A. S. Waskom)
ELVIE L. WASKOM.

Witness:
The signature and mark of
L. J. ROGERS,
J. E. ROGERS,
A. S. WASKOM."

(Acknowledgments.)

Counsel for Complainant:
We offer the map, Exhibit No. 16, in evidence.

The Court:
The map is admitted in evidence, and is reproduced at end of this statement of evidence.

144 (Direct Examination Resumed.)

By Counsel for Complainant:
"The map is one of the J. F. Rogers lease. It is designated there L. J. Rogers lease. Ben Leuty and two chainmen were with me when I made the survey. Mr. Hoffsess ran the instrument. The survey was made the latter part of April, 1931. We drove out to the house of Mr. Rogers, one of the lessors. He went with us to all of the corners of his tract of land. He was with us at every corner but he might have been gone a few minutes during the entire time we were making the survey. I asked him if he would point out the corners to me and he did so. That was J. E. Rogers, one of the sons of J. F. Rogers. He took us to what he pointed out as the Southwest corner of his tract of land. He showed us an iron pin down there and said his Southwest corner was 66 feet West of that iron pin. That iron pin had a gear wheel on top of it and it is shown on Exhibit 16. I have marked it on the map as Point "A". He said that the pin and wheel had been placed there shortly after the surveyor had made the subdivision of that tract of land and that his corner was 66 feet West of that. I established the Southwest corner of the lease at a point 66 feet West of the gear wheel. It was 66 feet West of the gear wheel in an old road and the corner is shown on the map. Mr. Rogers was there with us.

From there I ran East along the old fence. The course and call is shown on my map. I have marked the corner that I established as the Southwest corner by the letter

"B". We tied into some trees but I do not know whether we marked any of the trees or not. I put an iron pipe at "B". I then ran 738.89 feet as indicated on my
145 map, along an old fence, which is also indicated on my map. I stopped at 738.89 feet because there is an old fence corner there that Mr. Rogers pointed out as his Southeast corner. From there we ran Northeast with the fence. We followed approximately the fence line. It is an old fence to the highway. The fence was not exactly straight. It is shown on my map. When I ran Northeast I stopped near a fence corner.

I have marked on my map point "C". Mr. Rogers said that the fence corner was his Southeast corner.

From "C" I ran to point "D", where I turned East again. From "C" to "D" I ran 940.45 feet and then turned East. I turned East because that was near the fence corner that Mr. Rogers pointed out as his East line. He pointed out the fence running East and West as being over on his land a few feet. He showed us his most Easterly Southeast corner. He showed us an iron pin there and I found it. I have marked that "E". That was close to a fence corner and the distance is shown there. It was within approximately 5 feet of a fence corner. The distance is 462.24 feet. From East I ran North with an old fence line a distance of 1715.64 feet. That is the line shown slightly Northwest, North 1 degree, 29 minutes West. I followed in general the course of the old fence there. The fence is shown on my map as I tied in it. At the Northeast corner is an iron pin which Mr. Rogers pointed out as his Northeast corner. The corner is approximately in line with the fence going South and the center of the East and West road. The road appeared to be an old one. We put a two inch iron pipe around the pin
146 that Mr. Rogers pointed out as his corner and he saw us do that. From there we ran West 1228.19 feet. At that point there was an old fence running South and we found a post oak tree which marked the Northeast corner of the two acre tract.

Counsel for Defendants:

"He has said that J. E. Rogers told him about a corner. My client's lessors are entirely different people and hold under the old gentleman. I think it is admissible against one of these defendants; but I don't think it is admissible against my client, and I object to it.

The Court:

All right, go ahead."

(Direct Examination Resumed.)

By Counsel for Complainant:

"I have marked the point where I found the iron pin Mr. Rogers pointed out as "F" on the map. At a distance from "F" 1228.19 feet, I found the old fence line running South and a post oak witness tree.

The lease said "excepting two acres out of the Northwest corner sold to Wood." I had then gotten to the two acre tract. I had a description of the two acre tract which I got from Ben Leuty. I ran around the 2 acres. I found at the Northwest corner of the J. F. Rogers tract, as I fixed it in the L. J. Rogers lease, and the Northeast corner of the 2 acre tract, a 16 inch post oak tree. It was five feet West of the corner. I have marked the location of the post oak tree in red. I think I put an iron bar or an iron rod or something there to make that corner. There was originally a stake there, which I found. It was rather an old stake and I put the pipe where the old stake was.

147 There was a fence running South from there. It was an old fence. I ran South 1 degree 29 minutes West 751.54 feet. The old fence is shown along that line. The fence is marked with a black line and some X's in it. At the Southeast corner of the 2 acre tract Mr. Rogers pointed out an iron rod there in the fence corner. That was a fence corner made by the fence running West. I stopped there at the point which I have marked "H". I did not run to another point West of

point "G" but turned Southward. The road is up West of "G" and North of "H" and was not surveyed but is platted in.

When I ran West from "H" I ran 117.07 feet, following the fence. There was a house close. It was approximately the called distance from "H" but the house had been moved according to Mr. Rogers. I could not see evidence that it had been moved. Instead of running West I ran along the old fence North 86 degrees 42 minutes West. The line fell in approximately the center of the road. There was a fence running North from there on the East side of the road. I have marked it on the map point "I". From point "I" I ran approximately South down the road. There was a fence on the East side of the road and went on the West side. These fences are indicated on my map. The road was 43 feet wide and we ran in approximately the center of the road. That would make the fence about twenty or twenty-five feet East of the line until the Gladewater Pike was reached. The fence on the East of the line I established, ran South, and went on East when it hit the Gladewater road. It did not go across the pike but turned down the highway toward Longview. I did not survey that fence
148 down there. Nor did I survey the fence down the road on the South side of the road.

I found another fence going South after I crossed the Gladewater road and the location of the fence is shown on Exhibit No. 16. The fence was about 22 feet East of the line I established after I crossed the Gladewater road. The fence varied as shown on my map. It was an old fence. As I came on South I came back to point "B", where I started from. The fence as indicated on the map ran to the old gear wheel."

Cross Examination.

By Counsel for Defendants:

"I did not say that Mr. Rogers told me the gear wheel was put there by the surveyor when he was making a

survey for the Rogers but I said that Mr. Rogers told me it was placed there shortly after the surveyor made his subdivision. I do not believe he said who placed it there.

Q. Did you survey from the Sheppard Northeast corner, marked by the post oak, which we have agreed upon here, North?

A. No.

"I do not know if the fence line on the West side of that road extends to that post oak and that all of the road East of the Haynes tract extends from the post oak tree on North to the highway. I did not measure to see. I did not try to locate the Wiley Davis Northeast corner. I have not figured how many acres in the tract as I located it.

I had a photostat copy of the lease.

"Q. It called for the line from "B" to "C" to be 224 yards, didn't it?

A. Yes.

149 Q. Or from "A" to "C"?

A. Yes.

"I did not make the map. I made the survey. I furnished the company the notes made on the ground. The notes called for feet. The lease did not call for feet.

I made no survey of the East line of the Haynes to ascertain whether all the road here comes off the Rogers land or not. I had nothing to do with drawing the ratification or fixing it and I do not know who did. I do not know whether they took the field notes that I furnished or not."

BEN D. LEUTY, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination:

By Counsel for Complainant:

"My name is Ben D. Leuty and I live at Bartlesville, Oklahoma. I am an engineer for the Empire Company. I graduated from the Texas A. & M. in 1924 in Civil Engineering. I have been surveying for the Empire Company and doing all kinds of engineering work since graduation. I have worked in Texas since 1929 and have done surveying in East Texas field. I surveyed the Empire leases in East Texas.

I surveyed the L. J. Rogers lease. The survey was made on the 27th and 28th of April, 1931. Ben Ramsey was note keeper in the party and acted as Chief of the party. Mr. Hoffsess was instrument man and Mr. Blackman was chainman. They are not in Texas now but are in Kansas.

150 When we made the survey, we had a description of the tract contained in the lease marked Exhibit No. 15.

I do not have the deed to Woods of the 2 acres that is excepted out of the lease when we started the survey. I had it after we started the survey. I went to Longview and searched the records, found a description of the tract out of the Northwest corner of the original tract.

Counsel for Complainant:

We offer in evidence EXHIBIT No. 17.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Deed.

L. J. Rogers, et al., to R. M. Wood.

Dated: May ..... 1917.

Filed: May 15, 1917.

Recorded in Vol. 32, page 582, Deed Records, Gregg County, Texas.

The State of Texas,
County of Gregg.
Know All Men by these Presents:

That we, Mrs. L. J. Rogers, wife of J. T. Rogers. dec'd, J. E. Rogers, son of J. T. Rogers, deceased, and Elvie Waskom, (nee Rogers) daughter of J. T. Rogers, dec'd, joined by her husband, Azzie Waskom, all the heirs at law of J. F. Rogers deceaed, of the County of Gregg, State of Texas, for and in consideration of the sum of fifty ($50.00) Dollars, to us in hand paid by R. M. Wood, as follows:

Fifty ($50.00) Dollars, cash in hand paid, the receipt of which is hereby acknowledged and confessed, have granted, sold and conveyed, and by these presents do grant, sell and convey, unto the said R. M. Wood, of the County of Gregg, State of Texas, all that certain tract or parcel of land situated in the County of Gregg, State of Texas, to-wit:

Being a part of the G. A. Thompson Survey, beginning at the N. W. corner of a twenty-five acre tract of land, conveyed by E. L. Walker, M. D., and Nannie E. Walker to J. W. Mings, by deed dated November 25th,
151 1910, and recorded in Vol. X, page 278, and 279, of the Deed Records of Gregg County, Texas; said beginning corner being 487 vrs. West of the N. E. corner of the G. A. Thompson Survey;

Thence East 118 feet and 3 inches, witness P. O. tree, 24 inches in diameter, bears N. about 80° W. 27 feet;

Thence S. 828 feet to the N. boundary line of W. H. Conn, 50 acre tract;

Thence W. 118 feet and 3 inches to the original SW. corner of the J. W. Mings, 25 acre tract;

Thence N. 828 feet to the place of beginning, containing in all 2 acres of land, more or less.

This being the same tract of land, conveyed to us by J. W. Mings and wife, Addie Mings, by deed dated May 7th, 1917, recorded in Vol. 32, on page 572-3, Deed Records, of Gregg County, Texas.

To which reference is hereby made for a more detailed description of the land herein conveyed.

To have and to hold the above described premises together with all and singular the rights and appurtenances thereto in anywise belonging unto the said R. M. Wood, his heirs and assigns forever; and we do hereby bind ourselves, our executors and administrators to warrant and forever defend, all and singular the said premises unto the said R. M. Wood, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

Witness our hands at Gladewater, Texas, this .... day of May, A. D. 1917.

MRS. L. J. ROGERS,
J. E. ROGERS,
AZZIE WASKOM,
ELVIE WASKOM."

(Acknowledgments.)

(Direct Examination Resumed.)

By Counsel for Complainant:

"When we made the survey, Mr. Rogers was with us."

Counsel for Defendants:

"Will you note that you would not carry that as binding against anybody, except the Mr. Rogers who made the statement?

Counsel for Complainant:

I don't mind the objection, but I take issue with that.

152 Counsel for Defendants:

"Well, note the exception. I don't see how it could be binding on anybody except the party who made it.

The Court:

"I don't think it would be. Go ahead."

(Direct Examination Resumed.)

By Counsel for Complainant:

"Under the circumstances, as indicating the public claim there by a person whose deed called to be there by the field notes themselves. Was he one of the lessors?

A. Yes, he lives on the place; and his name is Rogers.

Q. All right."

(Direct Examination Resumed.)

By Counsel for Complainant:

"He took us to approximately the Southwest corner of the lease and showed us an iron post with a cone shaped cogwheel on it, which is what I referred to as

the gear wheel. He said his corner was 4 rods West or 66 feet. We set a corner 66 feet from the gear wheel. We put an inch and a half pipe there and marked some trees. The trees were within seven feet of the pipe. There was no road where we set the pipe. There had been an old road West of it, I will say 12 feet; and at the time we were there the travel was going between the pipe we set and the cone shaped cogwheel. The ruts were washed terrible West of where we set the pipe. There was a fence to the West of the road. I will judge the fence was about fifteen or twenty feet West of where we set the pipe.

We started our work from that point and in making a survey we ran a traverse around the lines and closed the traverse. We actually started our traverse on
153 that cog wheel there. We showed on the map our actual survey lines. The little triangles shown on the map represents angle points in our traverse. There are probably more instrument points than the triangles but those little triangular points are angles in our traverse line. We ran East along the South line of the lease. There were improvements along there, being a fence at that time. We ran North of the fence.

By the Court:

"Q. How far West did that fence go, between "C" and "A"?

A. The corner is at "C"; and at "A" I show, Judge, that was within 3 feet of that cog wheel at that time.

By the Court:

Q. Was that where the fence extended?

A. Yes.

By the Court:

Q. Did it not extend any further West than that?

A. No."

(Direct Examination Resumed.)

By Counsel for Complainant:

"At "C" I reached a fence corner. From there we followed in a general direction the fence a little East by North. The fence is shown on the map by a black line with crosses. The lease called for 310 yards and that would be 930 feet. The line we ran is 10 feet longer. The direction is about the same. Mr. Rogers said they had always assumed that the fence corner at point "C" was their corner. The fence corner was about an 18 inch square fence pole. The fence was not new but it was a good fence and in good repair. It had been kept in good shape.

154 When we came to point "E", Mr. Rogers pointed out to us an iron pipe. He said they did not know whether the fences running North from the highway and running East were on the line or not and they did not claim it to be. It was in bad condition over close to "E" and ran off into the woods and did not run to the corner. There was a one-half inch iron pipe at "E".

We then determined point "D" by running a line West from point "E" on the bearing and the called distance. There was nothing at point "D" other than as the map shows. The line from "D" to "E" as I have shown it is about 13 feet South of the fence. The fence from "D" running East was not in good condition. The wires were on the post. From "E" running East there was a fence but I did not survey out that fence. There was a fence corner there. The pipe is shown on the map at point "E" and about five feet from the corner. It is within a foot I believe of the East and West fence.

From "E" we ran North approximately along this fence up to point "F". I do not believe we passed any fence corners in running this line. There might have been an old fence coming in there. The dotted line that I have indicated West from "E" to "F" is our traverse line and is not a fence line. The heavy broken line is the fence

line and the solid line is our property line. We indicate a fence by putting an "X" in the broken line.

The fence continued on up to the Northeast corner. At that corner it intersected a lane fence running East and West. There was a line North but I would not call it a road. It had a well defined rut in it but no
155 regular road there. There was a fence on both sides of the lane.

We found an iron bolt with the head up and we took that to be the corner. I do not recall whether Mr. Rogers pointed that out or not. I was not there all the time. I was there the greater part of the time but not all the time.

We drove a two inch iron pipe around the iron bolt. The iron bolt was five feet West and eighteen feet North of that fence corner. There was a fence running to the East also and a fence to the West. It was an old fence.

From point "F" we ran along the lane. The fence continued on West. When we got to point "G" we stopped. I had found the field notes for this 2 acre tract out of the Northwest corner, which called for a witness tree on the northwest corner of the 2 acre tract. I ran and established that corner as being the West line. I do not recall whether the tree was marked. I believe it was but won't say for sure. I believe it was a post oak about fourteen or sixteen inches in diameter. The notes show 16 inches.

That tree is in the lane and there is a fence corner to the South of it in that South lane fence. From there we chained to the South and a little bit West approximately along that fence. We went South along that fence line. It varies one degree 29 minutes to the West of South. It was an old fence. The fence formed approximately a straight line as indicated on the map. The fences were tied into our traverse points and all along the traverse line. There was a residence at the South end of the 2 acre tract. I do not remember
156 whether I saw Mr. Rogers there. I do not recall seeing Mr. Rogers at the Northeast corner at point "G" but he might have been there. As I recall,

the fence ran down to point "H" and stopped. The length of that line is 751.54 feet. The call is for 757 feet. From there I went West to point "I". At point "H" we set the corner in an old fence corner. I won't say for sure whether we found a point there or whether we set our point in an old fence corner; but there is an old fence corner there. I believe the old fence stops there.

We ran West to point "I". The call there is 115 feet to the East side of the Union Grove Public Road with a black jack tree bearing North 10 degrees East 75 feet. We found a very large tree there but I would not say it was marked. I do not believe it was. It was scratched. It was right in the old fence line of the road. We made our corner at the called distance from that witness tree. We established our corner at the bearing from that tree. The corner was in about the East rut of the traveled part of the road. The road at that time was graded and ditched but that was about all. It appeared to be an old grading and ditching.

There was a fence on the East side of the road. There was no fence in front of the house and up about where the tree stood there was a fence running North. The fence was about where the map shows the line platted in but we did not tie to the fence so I could not be accurate about where the fence was located. Generally, though, the fence was along the East edge of the road. There was a fence going from point "G", West on the South side of the land but I did not tie to that fence. That tract of land was excepted from the lease.

157 From the corner I established at "I", we ran down to the Gladewater road in the approximate center of the road running South. At point "I" the road was about forty-three feet wide. It generally followed that width up and down. We ran down approximately the middle of the road. There was a fence on the East as we ran down the road. The fence was about five or six feet from the ditch of the road. It was right along the edge of the road. The fence would vary from eighteen to twenty-five feet from the line down the middle of the

road. The fences were not straight but they meandered down there. They are indicated on the map as we tied into them.

When the fence hit the Gladewater Highway it turned East along the North side of the highway. We tied the fence to our line where it went East along the North side of the highway as shown on the map and found it twenty-five feet East of our line and also another fence eighteen feet West of our line. There is a fence on South of the Gladewater Highway as shown on the map. The fence was 22 feet East of our line and the course of the fence is shown on the map. The farthest distance of the fence running East from our traverse line was 45 feet. At that point the fence on the West was 12 feet from the traverse line. As we went on down the road the map shows the location of the fence. The road swung in to get away from the washed place at "B". As I recall, there were some deep ruts just East of the point "B" and some ruts just West of the point "A". From point "A" the fence runs to the West, going South because the road circles back West.

158 Cross Examination.

By Counsel for Defendants:

Q. "And show "I" to be as a straight South line?

A. Yes.

Q. Your call is South 1 degree 3 minutes East, isn't it?

A. Yes.

Q. If your call is South 1 degree 3 minutes East, even in the ratification, in a half mile, that will make 45 feet difference, and a little over, won't it?

A. Yes.

Q. One degree, three minutes, is a little over 45 feet?

A. Yes.

Q. You show a straight line between "I" and "B"?

A. Yes.

Q. If you would follow the call of your own ratification that you prepared, there would be down here ap-

proximately 45 feet difference down here between the South line, "B" wouldn't there?

Mr. Trammell:
There is no evidence that he signed it.

Mr. Wynne:
Well, that your company got signed. If you are correct in the line "I", and come South 1 degree 3 minutes East, you would be approximately 45 feet, or 40 feet East of "B", wouldn't you?

A. This property line is South 1 degree 3 minutes East.

Q. You show on your map a straight South line?

A. Yes.

The Court:
He said that if he ran 1 degree 3 minutes East from "I" point, that he would be approximately 45 feet
159 East of "B". He asked you if you had run a line from "I" in the general direction of "B"; and you said you established a straight line between those points?

A. Yes.

The Court:
He said if you had run on a course of 1 degree 3 minutes East of "I", instead of the straight South course that you ran, if that would not carry you to a point approximately 40 or 45 feet East of your point "B".

A. If we ran 1 degree East of the line we have here, it would throw us about 45 feet there.

The Court:
All right.

Mr. Wynne:
Also, take "I" up here. The call for the two acre deed is to stop in the East side of the road, isn't it?

A. That is what Mr. Trammell read for the call.

Q. It called to stop at the East side of the road; but you ran 22 feet into the center of the road; didn't you?

A. I established the point "I" the called distance from the bearing object.

Q. The call says "about." Read the call about the bearing tree, and see if it doesn't say "about."

Mr. Trammell:

That refers to the road, as it was then.

Mr. Wynne:

The call is: "Thence West 115 feet to the East side of the Union Grove Public Road;" isn't it?

A. That is the call.

Q. "Witness a black jack bears about 10 deg.
160 E. 75 feet?"

A. That is right.

Q. Now, of course you took the tree, and ran it absolutely 10 deg. 75 feet, didn't you? and that is your corner 22 feet from the fence line?

A. Yes.

Q. If you had moved over to the East side of the road, if the road had not been changed—so far as you know, it had not been changed, had it, since 1878?

A. There was no evidence that it had been changed.

Q. If you put your corner back over to the East side of the road instead of 22 feet from the East side of the road, and came on South, it would make a difference there of several feet, wouldn't it, if you came South 1 degree East?

A. It would have, yes.

I found the call from "C" to "D" approximately correct. I also found the call from "D" to "E" and "E" to "F" approximately correct. I ran 1228 feet on the call from "F" to "G". The map makes the line 409 and a fraction yards over to "G". The call in the partition deed is 440 yards. 409 yards plus 147 feet called in the

Mings deed makes a total of 1375 feet or 458 yards. There is a difference of 55 feet between the called distance of 440 yards and the distance of 1228 feet plus 147 feet.

When we came to the gear wheel, Mr. Rogers did not tell me that it was the point the surveyor had set as the corner of the land partitioned in the Rogers estate. He did not say anything about the surveyor having done that. I was there when Mr. Rogers was talking to Mr. Ramsey.

161 By the Court:

"Q. Did he say anything about that having been there since shortly after the partition was made?

A. I do not recall that he mentioned the partition at all, your Honor."

Re-Direct Examination.

By Counsel for Complainant:

"He said that his uncle set that cog wheel there. I do not recall that he said when. He said the cog wheel was 4 rods East of their corner."

H. J. PATTERSON, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Complainant:

"My name is H. J. Patterson and I live in Bartlesville, Oklahoma, and am in the employ of the Empire Company as a lawyer. I have been with the company about fifteen years.

I am familiar with the Empire L. J. or F. E. Rogers lease. I know Ben Cox who is located in Tyler, Texas, and is a land man for the Empire Company.

I was present when the oil and gas lease marked Exhibit No. 18 was executed. I went in company with Ben Cox out to this Rogers tract. As I recall, we were scuffling in regard to a surface lease out there and about the time

we got ready to return back to Tyler, Mr. Cox took this lease out. At that time there was present J. E. Rogers and Mr. Cox was speaking to Mr. Rogers. There was nobody else present at that time. J. E. Rogers is sometimes known as Dink Rogers. I was sitting in
162 the car when we first went out to get the corrected lease executed. I had been talking about a surface lease. The Empire Camp is on the Rogers lease. Mr. Cox had the lease with him and told Mr. Rogers that the engineers had completed the survey of the tract of land and they found out that they had not definitely carved out a 2 acre tract up in the Northwest corner. As I recall Mr. Cox said there was another call of 700 and some odds yards on the East, in which there was some error in the description. That was from "D" to "E". Mr. Rogers told him that he would not execute the corrected lease until he had consulted with "Uncle Oscar." Mr. Cox went to Gladewater and got the Uncle and I stayed there.

We did not have the original lease or a copy of it nor did Mr. Cox. His Uncle came out there and read the corrected lease over and then there was a question as to whether or not the original lease had the intention clause in it. I will read the intention clause:

'It being the intention of lessors herein to lease all land owned by them in said survey.'

J. E. Rogers made some question about that and his uncle said they thought they had some excess over there. He said 'We really think what you boys are after is to get some excess.' I told them I thought we had any excess that he had out there under the intention clause, and he said he did not think that was the original lease. I said if it was not we would cut it out of the correction lease and asked him to get me his abstracts. Due to the fact that J. E. Rogers did not have the abstracts
163 nor did Ben Cox, J. E. Rogers and Ben Cox drove to Longview and procured the abstracts. They

came back with the abstracts and the abstracts had the original lease. They were the J. E. Rogers abstracts, as I understand them. Rogers had loaned them to somebody over at Longview for examination for royalty conveyances. Upon seeing that the same intention clause was in the corrected lease that was in the original lease, they then concluded that they just as well go on and sign it. You have handed me Exhibit No. 15 and I find the intention clause in there which reads: 'It being the intention to include all land owned or claimed by lessors in said survey.' The lease was executed and we came back to Tyler. The day was very well consumed. It was acknowledged on the porch on the East side of the house."

Counsel for Complainant:
We offer in evidence EXHIBIT No. 18.

The Court:
The exhibit is admitted in evidence and is in words and figures as follows:

"Oil and Gas Lease (Correction).

Mrs. L. J. Rogers, Elvie Waskom, Azzie Waskom to Empire Gas & Fuel Company.

Dated: May 8th, 1931.

Filed: May 9th, 1931.

Recorded: Vol. 84, page 516. Deed Records, Gregg County, Texas. File No. 14690.

Agreement, made and entered into the 20th day of October, 1930, by and between L. J. Rogers, a widow, Elvie Waskom and husband, Azzie Waskom; J. E. Rogers and wife, Ola May Rogers, of Gregg County, Texas, here-

inafter called lessor (whether one or more) and
164 Empire Gas & Fuel Company, hereinafter called lessee;

Witnesseth: That the said lessor, for and in consideration of Ten ($10.00) Dollars, cash in hand paid, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of lessee to be paid, kept and performed, ha— granted, demised, leased and let, and by these presents do grant, lease and let unto the said lessee for the sole and only purpose of mining and operating for oil and gas and of laying pipe lines and of building tanks, power stations and structures thereon to produce, save and take care of said products, all that certain tract of land situated in the County of Gregg, County, State of Texas, described as follows, to-wit:

Being a part of the G. A. Thomas Headright starting at the N. E. corner of Lot No. 2, which is the N. W. corner of the W. H. Rogers tract No. 1;

Thence N. 89 deg. 44′ W. a distance of 1228.19 ft.;

Thence S. 0 deg. 56 W. a distance of 726.32 ft.;

Thence S. 80 deg. 59′ W. a distance of 118.34 ft.;

Thence S. 1 deg. 03′ E. a distance of 1919.14 ft.;

Thence N. 89 Deg. 30′ E. a distance of 738.89 ft.;

Thence N. 10 deg. 36′ E. a distance of 940.45 ft.;

Thence N. 88 deg. 31′ E. a distance of 462.24 ft.;

Thence N. 1 deg. 29′ W. a distance of 1715.64 ft. to the point of beginning, said tract to contain 66-1/5 acres, more or less. It being the intention of the lessor herein to lease

all land owned by them in said survey and containing 66-1/5 acres, more or less.

It is agreed that this lease shall remain in force for a term of ten years from this date, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee.

In consideration of the premises the said lessee covenants and agrees:

1st. To deliver to the credit of lessor, free of cost, in the pipe line to which they may connect their wells the equal one-eighth part of all oil produced and saved from the leased premises.

2nd. To pay to lessor as royalty for gas from each well where gas only is found, while the same is being sold or used off of the premises, one-eighth of the market price at the wells of the amount so sold or used, the lessor to have gas free of charge from any gas well on the leased premises for all stoves and inside lights in the principal dwelling house on said land during the time by making lessor's own connections with the well at lessor's own risk and expense.

3rd. To pay to lessor as royalty for gas produced from any oil well and used by lessee for the manufacture of gasoline one-eighth of the market value of such
165 gas. If such gas is sold by lessee, then lessee agrees to pay lessor, as royalty, one-eighth of the net proceeds derived from the sale of said casinghead gas at the wells.

If no well be commenced on said land on or before the 20th day of October, 1931, this lease shall terminate as to both parties, unless the lessee on or before that date shall pay or tender to the lessor, or to the lessor's credit in the Everett Banking Co. Bank at Gladewater, Texas, or

its successors, which shall continue as the depository regardless of changes in the ownership of said land, the sum of $66,20/100 Dollars, which shall operate as rental and cover the privilege of deferring the commencement of a well for 12 months from said date. In like manner and upon like payments or tenders the commencement of a well may be further deferred for like periods of the same number of months successively. And it is understood and agreed that the consideration first recited herein, the down payment, covers not only the privilege granted to the date when said first rental is payable as aforesaid, but also the lessee's option of extending that period as aforesaid, and any and all other rights conferred.

Should the first well drilled on the above described land be a dry hole, then and in that event, if a second well is not commenced on said land within twelve months thereafter, this lease shall terminate as to both parties, unless the lessee on or before the expiration of said twelve months shall resume the payment of rentals in the same amount and in the same manner as hereinbefore provided. And it is agreed that, upon the resumption of the payment of rentals as before provided, that the last preceding paragraph hereof, shall continue in force just as though there had been no interruption in the rental payments.

If, at the expiration of 10 years from the date of this lease, oil or gas is not being produced on the leased premises, but lessee is then engaged in drilling for oil or gas, then this lease shall continue in force so long as drilling operations are being continuously prosecuted on the leased premises; and drilling operations shall be considered to be continuously prosecuted if not more than sixty (60) days shall elapse between the completion or abandonment of one well and the beginning of operations for the drilling of a subsequent well. If oil or gas shall be discovered and produced in paying quantities from any such well or wells drilled or being drilled at or after

the lapse of 10 years this lease shall continue in force so long as oil or gas shall be produced from the leased premises.

It is specially agreed that in the event that oil or gas is produced from said premises and said production shall for any reason cease or terminate, lessee shall have the right at any time within ninety (90) days from
166 the cessation of such production to resume drilling operations in the effort to make said leased premises again produce oil or gas, in which event this lease shall remain in force so long as such operations are continuously prosecuted as defined in the preceding paragraph, and if they result in production of oil or gas, so long thereafter as oil or gas is produced in paying quantities from the premises.

If said lessor owns a less interest in the above described land than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided for shall be paid the said lessor only in proportion which lessor's interest bears to the whole and undivided fee.

Lessee shall have the right to use, free of cost, gas, oil and water produced on said land for all operations thereon, except from water wells of lessor. When requested by lessor, lessee shall bury pipe line below plow depth. No well shall be drilled nearer than 200 feet to the house or barn now on said premises without the written consent of the lessor. Lessee shall pay for damages caused by all operations to growing crops on said land. Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

If the estate of either party hereto is assigned—and the privilege of assigning in whole or in part is expressly allowed—the covenants hereof shall extend to their heirs. executors, administrators, successors or assigns, but no change in the ownership of the land or assignment of rentals or royalties shall be binding on the lessee until

after the lessee has been furnished with a written transfer or assignment or a certified copy thereof; and it is hereby agreed that in the event this lease shall be assigned as to a part or as to parts of the above described lands and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportionate part of the rents due from him or them, such default shall not operate to defeat or affect this lease in so far as it covers a part or parts of said lands upon which the said lessee or any assignees thereof shall make due payment of said rental.

Lessee shall have the exclusive right to build, operate and maintain pits, reservoirs, pickup stations and plants for the purpose of picking up and conserving the waste oil that flows down the creeks, ravines and across the land embraced in this lease, whether said oil is produced from lands, covered by this lease or other lands, and lessor shall be entitled to receive the royalty hereinbefore reserved on all such oil so saved.

In case of cancellation or termination of this lease for any cause, lessee shall have the right to retain under the terms hereof twenty (20) acres of land around each oil or gas well producing, being worked on, or drilling hereunder (as long as such operations are continued in good faith) such tract to be designated by lessee in as near a square form as practicable.

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In the event lessor considers that lessee has not complied with all its obligations hereunder, both express and implied before, production has been secured, or after production has been secured, lessor shall notify lessee in writing, setting out specifically in what respects lessee has breached this contract. Lessee shall then have sixty days (60) after the receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by lessor. The service of said notice shall be precedent to the bringing of any action by lessor, on said lease for any cause and no such action shall be brought until the lapse of sixty (60) days after service

of such notice on lessee. Neither the service of said notice nor the doing of any acts by lessee aimed to meet all or any of the alleged breaches shall be deemed an admission or presumption that lessee has failed to perform all its obligation hereunder.

Title to the minerals vested in grantee under this grant shall not end or revert to grantor until there is a complete, absolute and intentional abandonment by grantee of each and all of the purposes, expressed or implied, of this grant and every part and parcel of the premises described in this grant.

Lessor hereby warrants and agrees to defend the title to the lands herein described and agrees that the lessee shall have the right at any time to redeem for lessor by payment, any mortgages, taxes, or other liens on the above described lands, in the event of default of payment by lessor and be subrogated to the rights of the holder thereof.

This lease being executed for the purpose of correcting description in that certain lease made by the parties hereto 10/20/30 recorded Volume 61, page 295 County Clerk Records, Gregg County, Texas, and to be lieu of said lease.

In testimony whereof we sign this 8th day of May, 1931

her
MRS. L. J. ROGERS, X
mark

ELVIE WASKOM,
AZZIE WASKOM,
J. E. ROGERS,
OLA MAE ROGERS.

Witness to mark:
H. J. PATTERSON,
H. BEN COX."

(Acknowledgments.)

168 BEN COX, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Complainant:

"My name is H. Ben Cox and I live in Bartlesville, Oklahoma, and am Assistant Superintendent for the Land Department of the Empire Gas & Fuel Company. I have been there two years and before that time I was in Texas and occupied the position of District Land Man in Tyler and Houston. I was in Tyler about three years and Houston about one. I was living in East Texas in 1931. In my capacity as District Land Man I had something to do with the Empire L. J. or F. E. Rogers lease. You have handed me Exhibit No. 18, being the corected lease from L. J. Rogers and others to the Empire. The original lease was to Chandler.

The company advised me that the description in the original lease was in error, and also excepted a two acre tract; that the two acre tract was not excepted by metes and bounds description and that our surveyor had surveyed the tract, which left out the two acres. That we had to secure a ratification lease, or a new lease with a description as worked out by our surveyors. I think Mr. Patterson came down from Bartlesville about that time to do corrective work on the various leases and as I recall this lease had been prepared and was brought down by him. We went out to the Rogers land.

At that time I was also negotiating for surface lease for a camp site. We talked about the surface lease and brought up the question of securing a corrected lease.

169 At that time we were talking with Dink Rogers. We were out in the yard. We went in the house later on. His mother was in there, his wife and

his sister, Mrs. Watson and, I believe, her husband. During the discussion concerning securing the lease, Dink said he would not have anything to do with it until he had talked to his Uncle Oscar, who lived in Gladewater. His uncle's initials were F. H. or F. E. and I have met him. He has been in the Court room. There he is and it is F. E. Rogers. I told Dink I would go to Gladewater and get his uncle and bring him out there and discuss the matter. That was agreeable with him. I went to Gladewater and brought the uncle out there and explained to him what we wanted. There was present then Dink, Uncle Oscar, Mr. Patterson and myself. By Dink I mean J. E. Rogers. We were standing in the yard and some of the women folks were on the porch in hearing distance. We were out there the better part of the day. In discussing the lease and reasons for getting it and one thing or another, they thought we were probably trying to include some excess acreage. They said "We think what you want it for is you are trying to get some excess acreage." I said: "I do not understand it that way. This lease calls for the same amount of acreage as the original lease called for. If there is any excess in there it would be covered by your intention clause anyway in my opinion." I meant by the intention clause the clause that is in the original lease which you have handed me. Uncle Oscar said he did not think that clause was in the original lease and, as we did not have the original lease with us, in order to convince him that it was, we had to go to Longview and get some abstracts that belonged to J. E. Rogers. They were in some lawyer's office in Longview. J. E. Rogers went with me.

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We got the abstracts and drove back to the home place. Mr. Patterson remained at the Rogers house. After we got back we read the original lease in the abstract to them and showed that the same clause was in the original lease and they were satisfied. The new lease had practically the same intention clause. Then I took a Notary

Public from Gladewater and we had all of them sign the lease and took the acknowledgments and went home. I made no representations to them other than as I have stated."

Cross Examination.

By Counsel for Defendants:

"I told J. E. Rogers and F. E. Rogers that the correction lease called for the same amount of acreage as the original lease.

Q. You did tell J. E. Rogers and F. E. Rogers that this lease contained the same amount of acreage as the other lease did?

A. That it called for the same amount.

Q. And that there was no additional land included in it, other than the first lease?

A. Well, no, the intention clause—

Q. Didn't you just testify that a minute ago?

A. Yes, that's right.

Q. And also told him that the change had been made from yards to feet, but there was no additional land?

A. I don't recall saying anything about the change from yards to feet.

171 Q. But it was changed from yards to feet?

A. Yes."

Re-Direct Examination.

By Counsel for Complainant:

"There was a discussion about the intention clause and I told him if he had any excess land it was included in the original lease in my opinion by reason of the intention clause. Mr. Patterson was there and we were both arguing with them."

Stipulation.

"It is stipulated that John Akin would testify that he bought this two acres on whatever date the deed shows, and that it was fenced at that time, and that the fence has been kept up since that time by him until he sold it to Mr. Clark, and that no claim as far as he knows has ever been made to any part of that two acre tract since he has owned it, or been concerned with it, by any of the Rogers."

Counsel for Defendants:

"We don't claim any part of that two acres, as fenced at this time.

Counsel for Complainant:

I am so stipulating as to Mr. Pegues.

The Court:

Let the record show that it is agreed that the respondents do not claim any part of the two acres just referred to as fenced."

Counsel for Complainant:

We offer in evidence EXHIBIT No. 19.

172 The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Ass'gn Oil & Gas Lease.

"W. P. Chandler to Empire Gas and Fuel Co.

Dated Oct. 21, 1930.

Filed Nov. 18, 1930.

Recorded Vol. 61, page 294, Deed Records Gregg County, Texas.

Whereas, on the 20th day of October, 1930, a certain oil and gas mining lease was made and entered into by and between L. J. Rogers (a widow), J. E. Rogers, A. S. Waskon and wife, Elvie Waskom, Lessors, and W. P. Chandler, lessee, covering the following described land in the County of Gregg and State of Texas, to-wit: being a part of the G. A. Thomas Headright, starting at the N. E. corner of Lot No. 2, which is the N. W. corner of W. H. Rogers tract Lot No. 1 running West 440 yards to Wiley Davis N. E. corner;

Thence South 880 yards;

Thence East 224 yards;

Thence North 310 yards at 12 deg. East of North;

Thence East 754 yards to W. H. Roger's line;

Thence North 572 yards to starting point, containing 68 1/5 acres, more or less, and being the same land described in a deed from J. W. Rogers, W. H. Rogers and F. E. Rogers to J. F. Rogers February 28th, 1899, and recorded in Vol. R, pages 59-60, Deed Records Gregg County, Texas, save and except two (2) acres out of the N. W. corner sold to R. M. Wood.

Said lease being recorded in the office of the County Clerk in and for said County in Book ...., page ....., and;

Whereas, the said lease and all rights thereunder or incident thereto are now owned by W. P. Chandler.

Now, therefore, for and in consideration of one dollar (and other good and valuable considerations), the receipt of which is hereby acknowledged, the undersigned the presents owner of the said lease and all rights thereunder

or incident thereto, does hereby bargain, sell, transfer, assign, and convey all rights, title and interest of the original lessee and present owner in and to said lease and rights thereunder, in so far as it covers the above described tract, together with all personal property used or obtained in connection therewith to Empire Gas and Fuel Company and their successors and assigns.

And for the same considerations, the under-
173 signed for himself and his heirs, successors and representatives, does covenant with the said assignee their successors or assigns, that W. P. Chandler the lawful owner of the said lease and rights and interest thereunder and of the personal property thereon or used in connection therewith; that the undersigned has good right and authority to sell and convey the same, and that said rights, interest and property are free and clear from all liens and incumbrances, and that all rentals and royalties due and payable thereunder have been duly paid.

In witness whereof, the undersigned owner and assignor has signed and sealed this instrument this 21st day of October, 1930.

W. P. CHANDLER."

(Acknowledgment.)

Counsel for Complainant:

We offer in evidence EXHIBIT No. 20.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Mineral Deed.

"L. J. Rogers, et al., to Curtis M. Willock.

Dated May 4, 1931.

Filed May 4, 1931.

Rec. Vol. ....., page ....., Deed Records of Gregg County, Texas.

File No. 14121.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That we, L. J. Rogers, widow, Elvie Waskom and husband, Azzie Waskom, J. E. Rogers and wife, Ola May Rogers, of Gregg County, Texas, for and in consideration of the sum of Ten & no/100 Dollars ($10.00) cash in hand paid by Curtis M. Willock, hereinafter called Grantee, the receipt of which is hereby acknowledged.

Have granted, sold, conveyed, assigned and delivered and by these presents do grant, sell, convey, assign and deliver unto the said grantee an undivided one-fourth interest in and to all of the oil, gas and other minerals in and under and that may be produced from the
174 following described land situated in Gregg County, Texas, to-wit:

Being a part of the G. A. Thomason H. R. starting at the N. E. Corner of Lot No. 2, which is the N. W. corner of W. H. Rogers tract Lot No. 1 running West 440 yards to Wily Davis N. E. corner;

Thence S. 880 yards;

Thence East 224 yards;

Thence North 310 yards at 12 deg. East of North;

Thence East 754 yards to W. H. Rogers line;

Thence North 572 yards to starting point, containing 68-1/5 acres, more or less, and being the same land described in a deed from J. W. Rogers, W. H. Rogers and F. E. Rogers, to J. F. Rogers, February 28, 1899, Rec. Vol. "R," pages 59-60, Deed Records of Gregg County, Texas, save and except 2 acres out of N. W. corner sold to R. M. Wood.

Together with the right of ingress and egress at all times for the purpose of mining, drilling and exploring said land for oil, gas and other minerals, and removing the same therefrom.

Said land being now under an oil and gas lease executed in favor of Empire Oil Company, it is understood and agreed that this sale is made subject to the terms of said lease, but covers and includes one-fourth of all of the oil, royalty and gas rental or royalty due to be paid under the terms of said lease.

It is understood and agreed that none of the money rentals which may be paid to extend the term within which a well may be begun under the terms of said lease is to be paid to the said grantee and in event that the above described lease for any reason becomes canceled or forfeited, then and in that event an undivided *none* of the lease interest and all future rentals on said land for oil, gas and other mineral privileges shall be owned by said grantee, he owning one-fourth of all oil, gas and other minerals in and under said lands, together with none interests in all future rents.

To have and to hold the above described property, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said grantee herein, his heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors and administrators to warrant and forever defend all and singular the said property unto the said grantee herein, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands this the 4th day of May, 1931.

her
L. J. X ROGERS,
mark
J. E. ROGERS,
175 OLA MAY ROGERS,
ELVIE WASKOM,
AZZIE WASKOM.

Witnesses as to mark:
HONOR STOKES,
E. P. BOREN."

(Acknowledgments.)

Counsel for Complainant:
We offer in evidence EXHIBIT No. 21.

The Court:
The exhibit is admitted in evidence and is in words and figures as follows:

"Mineral Deed.

"Elvie L. Waskom to Gossett & Harrington.

Dated: July 28, 1931.

Filed: July 29, 1931.

Recorded: Vol. ..... P. ....., Deed Records, Gregg Co., Texas.

File No. 21827.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, Elvie L. Waskom, joined herein by her husband, A. S. Waskom, of Harris County, Texas, for and in consideration of the sum of ten and no 100 dollars ($10.00) cash in hand paid by H. O. Gossett & H. M. Harrington, hereinafter called grantee, the receipt of which is hereby acknowledged, have granted, sold, conveyed, assigned and delivered and by these presents do grant, sell, convey, assign and deliver unto the said grantee an undivided one thirty second (1 32) interest in and to all of the oil, gas and other minerals in and under and that may be produced from the following described land situated in Gregg County, Texas, to-wit:

Being a part of the G. A. Thomason H. R. survey starting at the N. E. corner of Lot No. Two (2) which is the N. W. corner of the W. H. Rogers tract Lot No. One (1) running West 440 yards to Wily Davis N. E. corner;

Thence South 880 yards;

Thence East 224 yards,

Thence North 12 deg. East 310 yards,

Thence East 154 yards to W. H. Rogers line,

Thence North 572 yards to starting point, containing 68-1 5 acres more or less and being the same land described in deed from J. W. Rogers, W. H. Rogers and F. E. Rogers to J. F. Rogers, February 28th, 1899, Recorded in Vol. "R." pages 59-60, Deed Records of Gregg County, Texas, Save and Except two (2) acres out of N. W. corner sold to R. M. Wood, together

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with the right of ingress and egress at all times for the purpose of mining, drilling and exploring said land for oil, gas and other minerals, and removing the same therefrom, specilly granting to said grantee the right of ingress and egress upon and over said land at all times for the purpose of inspecting any and all oil wells, gas wells, storage tanks and checking the oil runs.

Said land being now under an oil and gas lease executed in favor of W. P. Chadler and now held by Empire Gas and Fuel Company it is understood and agreed that this sale is made subject to the terms of said lease, but covers and includes one thirty-second (1/32) of all of the oil royalty and gas rentals or royalty due to be paid under the terms of said lease, it being the intention to convey one barrel out of every thirty-two barrels of royalty oil accruing under said lease.

It is understood and agreed that one tirty-second of the money rentals which may be paid to extend the term within which a well may be begun under the terms of said lease is to be paid to the said grantee and in event that the above described lease for any reason becomes canceled or forfeited then and in that event an undivided one thirty second of the lease interest and all future rentals on said land for oil, gas and other minerals shall be owned by said grantee they owning one thirty second of all oil, gas and other minerals in and under said lands, together with one thirty second interest in all future rents.

To have and to hold the above described property, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said grantee herein, theirs heirs and assigns forever, and I do hereby bind myself, my heirs, executors and administrators to to warrant and forever defend all and singular the said property unto the said grantee herein, their heirs and

assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands this the 28th day of July, A. D. 1931.

ELVIE L. WASKOM,
A. S. WASKOM."

(Acknowledgment.)

177 Counsel for Complainant:
We offer in evidence EXHIBIT No. 22.

The Court:
The exhibit is admitted in evidence and is in words and figures as follows:

"Mineral Deed.

"H. O. Gossett, et al., to J. B. Parker.

Dated: January 15, 1932.

Filed: January 20, 1932, 8:40 A. M.

Recorded: Vol. 119, page 398, Deed Records, Gregg County, Texas.

File No. 1075.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That we, the undersigned, of Gregg County, Texas, for and in consideration of the sum of Ten and no/100 Dollars ($10.00) cash in hand paid by J. B. Parker, of Jena, Louisiana, hereinafter called grantee, the receipt of which is hereby acknowledged, have granted, sold, conveyed, assigned and delivered and by these presents do grant,

sell, convey, assign and deliver unto the said grantee an undivided one thirty-second interest in and to all of the oil, gas and other minerals in and under and that may be produced from the following described land situated in Gregg County, Texas, to-wit:

All that certain tract or parcel of land situated in Gregg County, Texas, being a part of the G. A. Thomason H. R. Survey, starting at the N. E. corner of Lot No. 2 which is the N. W. Corner of the W. H. Rogers' tract Lot No. 1 running West 440 yards to Wiley Davis N. E. corner;

Thence South 880 yards;

Thence East 224 yards;

Thence North 310 yards at 12° East of North;

Thence East 154 yards to W. H. Rogers line;

Thence North 572 yards to starting point, containing 68-1/5 acres, more or less, and being the same land described in deed from J. W. Rogers, W. H. Rogers and F. E. Rogers to J. F. Rogers, February 28, 1899, recorded in Vol. R, page 59-60, Deed Records of Gregg County, Texas, Save and Except two acres out of the N. W. corner sold to R. M. Wood.

Together with the right of ingress and egress at all times for the purpose of mining, drilling and exploring said land for oil, gas and other minerals, and removing the same therefrom.

178 Said land being now under an oil and gas lease executed in favor of W. P. Chandler now owned by Empire Gas & Fuel Company, it is understood and agreed that this sale is made subject to the terms of said lease, but covers and includes one thirty-second of all of

the oil royalty, and gas rental or royalty due to be paid under the terms of said lease.

It is understood and agreed that one thirty-second of the money rentals which may be paid to extend the term within which a well may be begun under the terms of said lease is to be paid to the said grantee and in event that the above described lease for any reason becomes cancelled or forfeited, then and in that event an undivided one thirty-second of the lease interest and all future rentals on said land for oil, gas and other minerals privileges shall be owned by said grantee he owning 1/32nd of all oil, gas and other minerals in and under said lands, together with 1/32nd interest in all future rents.

To have and to hold the above described property, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said grantee herein, his heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors and administrators to warrant and forever defend all and singular the said property unto the said grantee herein, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands this the 15th day of January, 1932.

H. O. GOSSETT,
H. M. HARRINGTON,
A. L. CONNOR, Trustee."

(Acknowledgments.)

G. W. CLARK, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Complainant:

"My name is G. W. Clark and I live about two miles East of Gladewater and have lived there since February, 1926. I know the location of the Mrs. L. J. Rogers tract.

It lies East of a tract of land owned by me. I have the Wiley Davis tract. He did own it. I have several old deeds from different ones. I bought the tract in
179 February, 1926. Most of my tract of land was fenced in February, 1926. There was an old road along my East line. It did not go clear to the Northwest corner. There was a little place there that the road made a square turn, coming up out of the highway going North and down about a couple hundred yards another square turn. Where it made the first square turn going up North from the main highway, when I bought it there was a little part of the corner of it the fence cut off, and a little extra road there in case of bad weather. I just left that there.

There is a little left out on my Northwest corner. The road, with that extra road there, made a round turn instead of a square turn. When I bought the land I naturally just thought that if that fence run square and had not left out that little part, that the fence was the line and the tract of land probably gave half the road. The original tract was fenced on the East side of the road. The fence came clear on down with the two acre tract from the highway. Coming out of the highway the fence ran North from the highway along the East side of the road and hit the Southwest corner of the 2 acre strip. The two acre strip was fenced to itself. It was fenced when I bought my tract on the West. There was a fence on my East line down there. The fences were from 35 to 40 feet apart. That is my estimation of the distance. I had been along there a good many times. There has been a change in the road with reference to its width. I gave an easement to the County. Most of the road came off my side of it. It has been widened but I do not know how
180 much wider. The fence on the East side of the road was kind of torn up at the time the Sun Company drilled a well there but they fixed it back. The fence is approximately where it was at the time I owned the 2 acre tract, with the exception of possibly right up

next to the house that I have on the two acres. There might be a little right there in front of the house that is torn down. The fence that ran from the Southwest corner of the 2 acre tract on down the highway has been torn down. It has been torn down since the oil boom in 1931. Up to that time it was a fair fence. I bought the two acre tract East of the road about six or seven years ago. I bought it after John Akin had leased it. I never heard of any claim to any strip of land along the West side of that two acre tract by any of the Rogers. I never heard of any claim to the two acre tract adverse to my claim until this case. I understand that the land East of the 2 acre tract and South belonged to Mrs. Rogers and her children. I never had the sixty acres that I bought surveyed.

Cross Examination.

By Counsel for Defendants;

I said I did not hear that any of the Rogers were claiming any part of the 2 acres as fenced up until the time of this suit. I believe Mr. Cowing told me the Rogers were claiming the land.

Q. You just heard me stipulate that we did not claim any part of the 2 acres.

A. I do not mean the 2 acres. I thought he meant the part that is in litigation. I misunderstood him. If my deed calls to read to the East side of the road,
181 I did not know it. I did not have either tract surveyed. At the time I went there the fence made a continuous North and South line that was along the East line of my 60 acre tract and the East line of the Sheppard tract, which is now the Haynes tract. The Haynes fence and my fence made a continuous North and South line before I gave this extra land for the road after the oil field came in. None of my land crosses the Gladewater road. When I moved back my East line fence West

to give some more road the oil field had come in. They wanted to widen and make a paved road there and I gave some extra land but up until that time the Haynes fence running North and South and my East fence running North and South was almost a continuous North and South line.

There was an old road that ran from the highway up close to what I call the old school house tract. The road swung to the West a little and cut off a little of my land up there. I did not fence it. The road swung to the left across what I thought was the Northeast corner of my tract. It swung across the school house lot. My fence, up until about the time I gave the extra road or soon thereafter, made a continuous line until it hit the school house tract and then it swung to the left."

Counsel for Complainant:

We offer in evidence EXHIBIT No. 23.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

182 "Deed.

"S. F. Jordan, et ux, to G. W. Clark.

Dated: February 11, 1926.

Filed: February 27, 1926.

Rec. Vol. 51, page 632, Deed Records, Gregg County, Texas,

The State of Texas,
County of Gregg.

Know All Men By These Presents: That we, S. F. Jordan and wife, Moddest Jordan, of the County of Gregg,

State of Texas, for and in consideration of the sum of sixteen hundred and fifty ($1650.00) dollars to us paid by G. W. Clark as follows:

Cash in hand paid the receipt whereof is hereby acknowledged, have granted, sold and conveyed and by these presents do grant, sell and convey unto the said G. W. Clark, of the County of Gregg, State of Texas, all that certain tract, lot or parcel of land situated about 2½ miles East from the town of Gladewater on the Jefferson Highway in Gregg County, Texas, and more particularly described as follows:

Beginning on N. B. line of G. A. Thompson survey 950 vrs. W. of its N. E. corner at NW. corner of J. G. Peques land,

Thence W. 1990 feet with N. line of Thompson Survey to E. W. Clements N. E. corner;

Thence South 730 feet to Jefferson Highway and on 1392 feet to N. B. line of J. M. Haynes 202 acre tract and S. E. corner of E. W. Clements land;

Thence E. 750 feet stake for corner on Haynes line;

Thence N. 425 feet to Jefferson Highway.

Thence in an easterly direction with Highway about 1390 feet to J. L. Rogers W line;

Thence North 1365 feet to beginning, containing 60 acres, more or less

To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said J. W. Clark, his heirs and assigns forever. And we do hereby bind

ourselves, our heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said G. W. Clark, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands at this 11th day of February, A. D. 1926.

S. F. JORDAN,
MODDEST JORDAN.

$2.00 Revenue Stamps *avoided.*"

(Acknowledgments.)

183 E. W. CLEMENTS, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Complainant:

My name is E. W. Clements and I live two miles East of Gladewater and have lived in Gregg County since 1884 and lived where I now live for about thirty-six years.

The property I own adjoins the G. W. Clark 60 acre tract on the West. It lies North and West of the J. M. Haynes land and joins said tract.

I know Wiley Davis. He owned the George W. Clark place at one time, which is North and South of the Gladewater road. He owned two tracts.

I know where the Wiley Davis land was located. His Northwest corner joined my land. He was J. W. Davis. I knew that land when the Victorys owned it. The old gentleman was living there when I first came to this country. The tract that I have reference to is the tract North and West of the road and is the second tract in the

deed to J. W. Davis, dated October 17, 1891. The road was then known as the Marshall-Tyler road. My line joined the Southwest corner of the Davis land North of the road. The call in the deed reads: 'Thence North 352 varas a stake on the South boundary of the Edwards Survey, a red oak North 40 degrees West 2,2 vrs.' That would be my Northeast corner and I remember that tree, the red oak and a pine I recollect. The red oak between Davis land and my land was a little Southwest of the corner. The Edwards survey was right North of my land and North of the Thomason Survey.

184 The red oak at my Northeast corner and Davis' Northwest corner was on my side, which had not been cleared. It had an X on it. It was about twelve feet probably Southwest of the fence corner there now, which is my fence corner. The red oak is gone. It has been gone fifteen years. I cleared the land.

The call in the Davis deed reads 'East with said line 446 vrs. a stake a pine bears 7 vrs.' There is a pine at the Northeast corner of the Wiley Davis land now but it is not right at the corner. I see the pine nearly every day. It is on a line between the Davis place and mine. It is marked with three hacks. There used to be an old pine there with a hack on it but Mr. Davis cut that and made palings out of it. That pine was a little nearer the Davis corner than the pine that now stands there.

When I first knew the Davis land there was no road between it and the Rogers land to the East. I remember when the road was put there but I do not remember the year. I worked on the road. Mr. Davis had probably ten or twelve acres fenced right along the road next to the highway but the North end was not fenced. Mr. Davis did not later fence it. It was fenced next to the highway when I cut the road out but the other part was not. I helped cut a part of the road out that runs from the Gladewater Highway to the Northeast corner. All of the road was not cut out at one time. Davis' fence on the East ran to where the road was cut but his fence did not

go clear to the North line. The road was not cut out to the North line.

185 There were several marked trees running along where the road was put. They cut the trees down and tried to put the road about the center of the line where the marked trees were. The road did not run up to the pine at the Northeast corner at that time. The original pine is gone. It had a cross on it. I thought the pine was the corner by being marked with an X on it. We did not cut the road up to that pine. I remember an acre being out for a school up there, which was about thirty years ago. The acre for the school house was not exactly square but it was supposed to be an acre. The road went right up to the Edwards survey and then turned West across part of the school grounds. It ran West of the original pine tree. It left a pine just North of the school house grounds. The pine was sixty or seventy feet from the school house grounds. There is no pine there now. There might be a little sweet gum tree there but no pine. I think William Wright put up the fence North toward the school house and Arch McFarland cleared that out up there nearly to the school house.

When I helped cut the road out it was about sixteen feet wide. The road North from where I stopped cutting to the North line of the survey was about twenty feet wide. The West side of the road was fenced. Part of it was fenced when Mr. Davis lived there and the balance of it was not fenced until Mr. William Wright bought the place. The fence on the East side of the road was built about the same time. It was about twenty four feet between the West fence and the Davis East fence. I do not think the original fence went out to the North

186 corner. It was fenced up to where Mr. Clark bought the tract. It was fenced more than half way to the North line. The two acres bought by Mings was fenced. Mr. Mings fenced part of it. It had been fenced up until the oil well came and tore it down. The fences on the two acres remained there substantially as

they were originally fenced. I never heard of a strip of land being left out East of that road by anybody. I never heard of anybody claiming any of that land in there except J. F. Rogers after it was deeded to him in 1899.

Cross Examination.

By Counsel for Defendants:

I have seen the old gear wheel. It was not there until they subdivided the land. I remember they subdivided the Rogers land into four tracts. The gear wheel has been there a good long while. It had been there a good many years before the oil boom. I am satisfied it was a land corner where the fence went there.

The fence on the South included the land that two of the Rogers got and the fence on the North tied into the point at the gear wheel. That made a common corner for the Rogers two boys' tract on the South and the Rogers tract on the North. That was a common corner up to the oil boom.

Mr. Davis had fenced his tract of land before there was any road ever cut out running to the North. When I cut out the road I cut out all the road that was cut out East of the Davis fence as he had fenced it. Then the road went on up North just as far as Mr. Davis had built his fence and that is where we stopped cutting.
187 Later on, the road was cut out on North and swung to the left and really went across the school house acre. The travel did not go across the school house ground except in bad weather, only right to the corner. I said the road swung across the school house ground and left the pine tree out. That tree was in line with the Davis line and in line with the Haynes line.

I know where the M. O. Sheppard 36 acre tract is but the post oak tree is on the King tract at the Southwest corner. The Northeast corner of the Sheppard tract is at a red oak. I know where the Northeast corner of the Sheppard tract is located as fenced. The fence on the Sheppard tract went on North after the Wiley Davis tract

picked it up on the North and extended on to the school house tract and was a continuous North and South fence. The fence remained there until Mr. Clark removed it since the oil boom to give some new road. Since the oil boom came the road has been widened and is now sixty to eighty feet wide.

I know where it is from the old gear wheel over to the Bozeman or Haynes tract as it was fenced and the distance is about fifty or six feet. The Haynes fence, which was the Bozeman fence, is now about eight or ten feet further West than it used to be. It is on the same course from the tree at the South corner. It was an old rail fence in those days. I know the old rail fence went further East because we tore down the old fence and set it over West. Mr. Haynes put the new wire fence about where the corners were of the old rail fence. I do not know where the B. F. Phillips well is located. I know where the well is located in the road. The old
188 rail fence ran along about where that well is located. Mr. Haynes put the wire fence there about fifteen years ago. So far as I know, Mr. Davis never had his tract surveyed out.

Re-Direct Examination.

By Counsel for Complainant:

I remember where the old Rogers house stood. It stood North of the Gladewater Highway. I do not know whether the old house was on the J. F. Rogers tract or not. There was a fence around the old house. The fence is right about where it now stands."

W. H. YORK, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Complainant:

"My name is W. H. York and I have lived in Gregg County since 1881. I live at Gladewater.

I know Bozeman that owned part of the Thomason Survey and married his oldest daughter. I knew Mrs. M. O. Sheppard. She was a daughter of Mr. Bozeman and was my wife's half-sister. I knew J. A. Simmons. Mrs. J. A. Simmons was my wife's mother. She was the former wife of Mr. Bozeman and later married J. A. Simmons. I do not remember his initials. He was a surveyor. He sold the M. O. Sheppard 36 acre tract. He and Mrs. Simmons sold M. O. Sheppard the little tract of land.

I helped him in his surveying work. I helped him run out the partition when it was made of the Bozeman estate. That was the West one-half of the Thomason Survey. At that time Alexander Rogers owned
189 the East one-half of the survey. Alexander Rogers was living there. He was away from there though at that time.

In making the survey and dividing up the West one-half in the Bozeman partition, we started on the Southwest corner of the Thomason Survey. I helped run out for Mr. Bozeman before he died timber lines in 1886. He was along with us. We always went to the Southwest corner of the Thomason Survey, which was the Southeast corner of the Rhodes Survey and on the lines of the Rain Survey. The Southwest corner of the Thomason Survey was marked at that time. There was an old thimble there in the edge of an old log road. I had a corral built there. There was a gum for a bearing tree and I had my gate swung to it. That gate is not there now but part of the stump is. It is kind of a rotten old stump there. The gum was marked in two places. It seemed to be a tree that was marked for the two corners. It was marked with an X on the East side with two hacks above and two below. A similar mark was there on the other side bearing for the two corners. There is a house just South of this tree and what I used to know as the Isley land. The house is ten or fifteen years old. There is a road North of it. There are fence corners there now. The road runs West and East until

it gets up about this corner, then turns a little to the left and goes to the Railroad crossing. It curves to the East, clear up on top of the hill. Trees were marked all along there. The line trees were marked by three hacks if the line run North of the trees and if it run South of the trees they were marked by three hacks on the South side. They were the usual surveyor's marks.

190 The corner in the line between the Rains and the Bozeman is a post oak. It is still there. It is marked with an X a little bit on the Northeast side. There used to be a stake driven down there about three to five feet and an iron stob. The post oak is the Southeast corner of Mrs. M. O. Sheppard 36 acre tract. There are no fences there and no fence corners. It looks like there have been.

We run North from the post oak to the center of the old highway and I drove down a pine knot myself. The road has been widened and paved. I could not say whether the stob would have been out in the paved portion of the road now. At that time there were two or three roads there. I took the oldest road to drive the pine knot down. It tallied with the field notes.

When we ran North from the post oak the line passed the Northeast corner of the M. O. Sheppard tract, which corner is marked I think by a red oak 8 or 10 inches in diameter, with an X. The tree is still there. Our line ran from North to the highway."

The Court:

"They agreed that was a boundary line tree."

(Direct Examination Resumed.)

By Counsel for Complainant:

"I never surveyed North of the Gladewater highway. I remember where Wiley Davis land was North of there. At that time the old road did not run there. It went down toward Mr. Davis house and later on the other road was

cut through there. I had nothing to do with cutting the road.

191 I remember where the school house was up there. It stood on the Davis land and was a square acre out of the North east corner of his tract of land. There were some trees there, post oaks and one thing or another. I think the post oaks were marked. They were on the line. I never saw the corner tree at the Northeast corner. Rogers owned the land to the East of the school house. The road when it was cut out North was from sixteen to twenty feet wide. It was fenced but I do not know just when the fence was put up.

I do not know anything about the division between the Rogers heirs. I remember where the old Rogers' house stood. It was South of the highway and there was was a fence running around it at that time. The fence on the East is about where it always stood and the fence went West of the garden. That would make the fence about 100 or 125 feet from the house on the West side. I do not know exactly where the old fence would lay with reference to the fence that is there now but they are approximately in the same place.

Cross Examination.

By Counsel for Defendants:

At the time I made the survey of the West one-half of the Thomason Survey I came to the post oak tree about the Southeast corner of the M. O. Sheppard 36 acre tract. I went North and passed the Northeast corner of the M. O. Sheppard 36 acres tract where there is a red oak. I have never run the line since it was cut out. It was all before them. That corner seemed to be exactly on the line. For all the purposes I have ever known that corner is accepted as the Northeast corner of the M. O. Sheppard 36 acre tract, which also marked the dividing line of the Thomason Survey as far as I know.

192 Q. The Rogers owned it on the East and the Bozeman on the West of the red oak?

A. Yes.

Q. And if the Rogers, in the partition of their father's estate, dropped back 66 feet from the red oak tree, they dropped back 66 feet from the accepted line that your father-in-law ran out?

A. I don't understand you.

"I testified we ran out the line to the red oak and ran it on to the road. That is the Northeast corner of the Haynes tract now. Hayes got the tract from Bob Bozeman.

Q. And the J. M. Haynes Northeast corner in the Highway here is the Northeast corner that you and Mr. Simmons went to when you surveyed to the Highway?

A. Yes, in 1886."

"The J. M. Haynes corner marks that corner. I know where the gear wheel is. It is about 50 or 75 feet East of the Haynes line. Mr. Simmons and I did not establish the line. We ran the East line. That line was well marked when we went there. We ran it. In marking the East line of the Bozeman we recognized that as the East line of the Bozeman.

Q. If the Rogers, in their partition, dropped back over to the gear wheel, they dropped back 60 or 75 feet from the line that you all had accepted?

A. It must be 50 or 60 feet.

"The road South of the Gladewater Longview Highway has never been anything but an outlet for stock until Mr. Bozeman put up a gin and they opened it up.

193 Mr. Rogers had a sawmill North of the house. They had timber down on the South part and they hauled timber from the South. The Rogers used the road to haul logs to and from their mill. They were a

family of lumber-makers, log-haulers and farmers. The road was used for anything they wanted to get out but it was not used much. I cannot recognize any part of the road running South in the picture. It is just a country road running through the trees and used for stock, getting them out of the bottom.

There seems to be a serious controversy as to the location of the Northeast corner of the Clark land and the Northeast corner of the school house tract up there. They put two roads through there. The present road is young but the other one is old. The road cut across the school house corner one time.

Re-Direct Examination.

By Counsel for Complainant:

The Bozeman fence was carried over about twelve or fifteen feet and it would vary. The fence was not exactly straight. It would vary from ten to fifteen feet. That is, the line from the fence. The Bozeman fence was West of the line. It was a rail fence. I cannot say when the Rogers fence to the East was put up. It was several years afterwards though. The fence was not straight on the Rogers site but it seemed to run mostly from tree to tree, zig-zagging about. And it is still that way, so far as I know. The road wobbled around trees it looked like. There are a good many low places up there. I believe there are two bridges after one left the highway
194 going South. There was a low place up there about the Northwest corner of the King tract."

Re-Cross Examination.

By Counsel for Defendants:

"Q. Now, no matter where the Bozeman fence was, it now runs North, and has run North from the red oak tree, and it is on the line that you all subdivided?

A. Yes."

Counsel for Complainant:

"I will now read the direct examination of J. W. Davis from his written depositions, taken by agreement of the parties:

(Thereupon the depositions of J. W. Davis were read in evidence, as follows:)

"J. W. DAVIS, a witness on behalf of plaintiff, was introduced, and being duly sworn to testify the whole truth, deposes and says:

My name is J. W. Davis. I am eighty-two years old and live in Mansfield, Louisiana. I am commonly known as Wiley Davis. I resided at one time in Gregg County. I do not remember what year it was but it was in the 90's though. I think I lived there in 1897 and I lived there seven years before that. I at one time owned a tract of land out of the G. A. Thomason Survey in Gregg County. I purchased the property from the Victory heirs. One of the Victory's married a Stewart.

I am the J. W. Davis named in the deed marked Exhibit "A" from J. T. Victory, et al., to J. W. Davis."

195 Counsel for Complainant:

"We offer in evidence the deed marked EXHIBIT 'A' attached to the depositions.

The Court:

The deed is admitted and is in words and figures as follows:

"WD.

W. H. Victory, et al., to J. W. Davis.

Dated Oct. 17, 1891.

Filed Nov. 8, 1900.

Recorded Vol. R, p. 406, Deed Records, Gregg County, Texas.

State of Texas,
County of Gregg.
Know All Men by these Presents:

That we, J. T. Victory, W. H. Victory, J. W. Victory, M. M. Stewart of the County and State aforesaid for and in consideration of the sum of $200.00 two hundred dollars in hand paid by J. W. Davis of said county and state the receipt which is hereby fully acknowledged do by these presents, grant, bargain, sell and convey unto the said J. W. Davis, his heirs and assigns, all that tract or parcel of land the same being a part of the Headright of

G. A. Thomason, lying and being situated in said County and State about 10 miles West of the Town of Longview, at the NE. corner of a survey made for B. M. Bozeman out of said George H. Thomason Survey;

Thence West 270 vrs. a stake from which a black oak bears N. 30 E. 3 vrs. a pine bears S. 23 W. 10 vrs.;

Thence N. 560 vrs. a stake from which a red oak bears S. 77 E. 13 vrs. a sweet gum bears N. 11 W. 10 vrs.;

Thence East 270 vrs. a stake;

Thence South 560 vrs. the place of beginning, containing twenty-six acres and 7/10 including seven acres, deeded to W. P. Victory by A. White and wife.

Also thirty four acres of land on the Thompson H. R. Survey;

Beginning at W. P. Victory NE. a stake in the center of the Marshall and Tyler road;

Thence North 352 vrs. a stake on the south boundary of the Edwards Survey a red oak N. 40 deg. W. 2-2/10 vrs.;

Thence East with said line 446 vrs. a stake a pine brs. 7 vrs.;

196 Thence South 507 vrs. a stake in the center of the Marshall and Tyler road a red oak S. 33 deg. W. 10 vrs.;

Thence N. 71-1/2 W. with said road 490 vrs. to the place of beginning, containing in all thirty-four acres, more or less.

Together with all and singular the rights, members and appurtenances to the same in any manner belonging.

To have and to hold the said land and premises unto him the said Davis, his heirs and assigns forever, in fee simple and we the J. T. Victory, W. H. Victory, J. W. Victory, M. M. Stewart will and our heirs, executors and administrators forever defend the right and title of said property unto the said J. W. Davis, his heirs and assigns forever, warrant and defend against the claim or claims of anyone lawfully claiming any part thereof.

Witness our hand this the 17th day of October, A. D. 1891.

W. H. VICTORY,
J. T. VICTORY,
J. W. VICTORY,
M. M. STEWART."

(Acknowledgments.)

"I lived on the land while I owned it and lived there about seven years. I knew the Rogerses that lived East of me and I supposed they owned that land. I never had the property surveyed at about the time I purchased it. No survey was made while I owned it. We ran it by the field notes in the deed. I built my fence by the field notes. It had already been surveyed and the corners established. Part of the property was enclosed when I purchased it. None of the East part was enclosed. It was enclosed from that road that turned North as you go around that corner. I fenced all of the second tract. I placed the fence right on the line where the old fence was built, right on that old fence line, it was all there. It was supposed to be somewhere about the line. I do not know whereabouts the line was. I never paid any attention to that line. It was not necessary for me to run that. The old fence was there and I was fencing the land in cultivation. I think there was a road East of the second tract but it did not run with the line. The road turned off from the highway and went down to a little sawmill that Rogers had down there. It did not run with the road I put there. It came into the highway mighty near at the same place it bore to the East. The highway, this road, turned off there and East from the highway right about the corner of that tract of land, a little bit East of it. I constructed a road along the east line of the second tract above referred to. I gave part of that road. We set up stakes as straight as we could get them and left fifteen feet from my line to where I run my fence row. I gave fifteen feet.

197

I don't know whether there was a red oak tree at the northwest corner bearing N. 40° W. 2.2 vrs. I tell you I never fooled with that line, that was the line between this tract of new ground and the twenty six acres of the old place. The twenty six acres or forty acre, I don't remember which.

In the call for the northeast corner of the second tract is "a stake a pine bears 7 varas,"—there was no pine, it was a sweet gum tree.

Q. This is the Northeast corner we are talking about.

Answer: That was a pine, the Northeast corner for the second tract you called it. There was no road there and when I fenced that land there the pine stood outside the road on the Northeast side of the road.

There was a pine knot drove in the ground so many varas from the tree, or links, I don't remember what the distance was, it was out from that pine a little East of North. And when they had the mill there I
198 understand they cut down that pine tree.

At the northeast corner there was woods, and when I was there last there was a post oak not very far from where the corner is. It has grown since I moved away. It might have been a bush; but it was a considerable tree when I was there last, and is now. If they didn't cut it down it is sixteen or eighteen inches through.

I gave McFarlin and William Wright a deed. I didn't own the tract lying to the west of the tract of land conveyed to J. F. Rogers by deed dated February 28, 1899; I wasn't there when that division was made.

That deed was made before I ever went to that place, the Victory Place.

I owned that tract of land lying West of the tract described in that deed. This is the division deed between the four boys. I don't know whether my northeast corner and the Rogers Northwest corner as used on the ground joined each other, as I tell you we surveyed our land by the field notes, I wasn't acquainted with them at the time. I didn't know who owned that land. I don't know where the corner was. I didn't know if there was one or not. At that time there was a big lot of land in that county owned by Cartright. They had a big lawsuit with the Cartrights—they owned all that country west of it. To San Augustine.

I am the Wiley Davis referred to in the first call of said deed from W. H. Rogers, et al., to J. F. Rogers, reading "run West 440 yards to Wiley Davis N. E. corner." I suppose so.

199. When I first went there my northeast corner was marked by a pine knot, with that pine tree as a witness. The corner was Northeast of the tree. Said road ran with my land lines, I gave fifteen feet and it run on that land. There was never no road there until I cut it out. I had no dispute with the Rogers boys over the location of my east line. Frank Rogers and I was discussing the line, he had that tract up there (motions with hand toward window) and he thought the lines come further over there. I told him I didn't know anything about that, I meant to go by the field notes in my deed. No changes have been made in the road at my northeast corner since I sold the same, only it has been widened and traveled a whole lot more when I was up there the last time I stood on the pine stump. They cut the pine tree down and had left the stump in the road, they had leveled it off and had it at the northeast corner of the road. They run over it. If you will go to that corner you will find a big pine stump right close to that post oak. The post oak is to the right of the pine tree a little bit. They may have dug that stump up now.

Counsel for Defendants:

"We offer in evidence the cross-interrogatories and answers."

The Court:

"They are admitted and are as follows:

"I did not have a survey made of my land at the time I purchased it. I accepted the deed. During all the time that I owned my tract of land I did not have it surveyed to determine accurately where my corners were.

200. It is true that there was a school lot or yard which was taken out of the northeast corner of my tract of land. After I purchased my place a road was placed fifteen feet from where my line run

to my fence. The first road I cut it out, and that is all I cut out. Before I purchased my property there was no road there, it was all woods. There was no fence there, no road there, it was all woods. There was no fence there, East. There was an old road on the East end of that twenty six or forty acres, on that old part of it. It run with the lines, I suppose they were trying to go as near the lines as they could. There was a big branch and a hollow there and it may have varied a little on account of that.

This old logging road didn't swing around the corner of the old school yard. Not that acre I give for the school. It was a hundred or two hundred yards West of that road, that new road come down and struck the log road and turned right square North and West out to Sports and Bozemans' places. I suppose the road was then widened and placed down between my property and the Rogers property. It's heap wider now. I left there, I sold that place the next year after I gave that school property away. That was just a little neighborhood road for them to go and come from school and travel through the neighborhood. When the road was run down between my property and the property of Mr. Rogers I built a fence about fifteen feet from the West edge of the road. My property had no fence along the East side at the time I purchased it. When I placed the fence on the East side from the corner, I placed it without having a survey made and just at the point I thought it ought to be. I set stakes up at the corner. We found the witness
201 tree, found the pine knot in the road, and then we set the stakes up and measured from them stakes. At the time I purchased my tract of land there was a sweet gum tree standing at the Northwest corner. On that second tract of land there was no bearing corner that I know of. There was one there I knew but I never hunted it up. I think the Northwest corner of my tract of land at the time I purchased it, was in a field. This had been cultivated as a field before I purchased it. The line was hacked on the trees all the way through to

the Northeast corner. Certainly I saw the bearing tree there. A big pine tree. It stood there until I left there. At what I thought was my northeast corner there was a pine knot at some point in the ground. Within my knowledge this pine knot had never been surveyed out as the corner. There was a man by the name of Greer bought that place before I did and failed to pay for it, and the Victorys and Greer surveyed it out, that is where we got the corners. They went to the corner and hacked the line all the way through. It was woods all the way through. And the post oak right down again the road was the corner with the pine knot in the middle of the Marshall and Tyler road. So far as I know the Rogers Northwest corner and the Davis Northeast corner never did join, as used on the ground. I didn't know nothing about it until after we built the fence. In the deed they claimed Rogers corner run up to my corner, but in that division Flavius Rogers, when they had the land divided they never begun in those corners you are talking about. I got this from Flavius. They commenced at their Southeast corner. They measured half of that tract of land. Alexander Rogers got half and
202 old man Waters got the other half. They surveyed whatever you call it. They measured his half and when old man Simmons, he is very particular about his surveying, when they come in there with a chain to ...ve the amount of land, they set up the corners but it never come to the Bozeman and Walters corner. It left a strip of land in there, from the way they started to survey. If they had begun at this line the strip would have been on the other side, but they begun on the East side and it left the strip on the west side of that land. That thirty six acres of land was Bozeman's land. I don't know whether there was at all times a strip of land between the Rogers Northwest corner and the Davis Northeast corner. I don't know nothing about their surveying in there, not a thing in the world about it. When I went there I was looking after my own land. When I built my fence I went by the deed so as to be sure I was right.

There has never been any dispute between me and any of the Rogers family with reference to a line. Me and Frank Rogers had a little dispute over that, but I told him, I am going by my field notes, here they are you can read them yourself. This is the tree, the notes is there they show it, this is the tree, this is the notes, and that is where I am going to put my fence, you can tear it down if you want to. In fact I have always known that the Rogers line was East of my line. I never knew how much land they had in there, nor how much land they claimed in there. I don't know anything about their line. I know they lived there, and where their land lines were I don't know anything about that.

203 As to whether I have always known that there was a strip of land between my land and the Rogers land, as fenced,—it was not fenced. The land—there was a road there, there was always a road, my fence was fifteen feet from the line and there was a road there. How much Mr. Rogers gave to that road after I left there I don't know. But I have been told my fence was never moved. They considered it the line. This strip of land has remained between the Rogers land and my land, as fenced, up until the time I left there."

JOHN F. BAKER, a witness for complainant, being recalled, testified as follows:

Direct Examination.

By Counsel for Complainant:

I found at the Northwest corner of the Wiley Davis tract a fence to the South and one to the East and West, running from that corner East to the corner that I found in running a line from the Northeast corner of the Sheppard tract there is about 6 vrs. excess over the call, which would make it about 452 vrs. or about 17 feet excess.

Cross Examination.

By Counsel for Defendants:

The North line of the West one-half, as I measured it on the ground, is 964 vrs. It is called 950 vrs. That would make 14 vrs. excess. Accepting the red oak tree and the post oak tree as a dividing line of the tract, by running a line North, that would put the line at the point I have designated, the dividing point. That would make the North and South line excessive. The South line of the East one-half is 967 vrs., which is 17 vrs. over
204 the call, which is 17 vrs. excess or about 50 feet. The North line is 982 vrs. or an excess of 32 vrs. The line from B to A is 404 vrs. and from A to the dotted line is 71 vrs., which would aggregate 475 vrs. on the South line of tract No. 1. That is the distance called for in the deed. I show the North line to be 487 vrs. on the same tract. The South line is about 12 vrs. less than the North line."

BEN LEUTY, being recalled by complainant, testified as follows:

Direct Examination.

By Counsel for Complainant:

"Q. Mr. Wynne was asking you this morning, I believe it was, about this call from "I" to "B", and what would happen if you ran South 1 degree 3 minutes East from your point up at "I". What course did you run from "I" to "B"?

A. South 1 degree, 3 minutes East.

Q. Where would it have put you, had you run South from "I" on your measurement?

A. About 45 feet—

The Court:

He testified to that.

Mr. Trammell:

I asked the witness if he had taken "I" and had run South on his measurement, where would he have been when he got to "B".

The Court:

He evidently would have been West of there; but I understood him to say this morning that he went straight South,—did not say he had run a course 1 degree 3 minutes East.

205 Mr. Trammell:

I think you misunderstood him, because it shows he ran 1 degree 3 minutes East.

Mr. Wynne:

Your Honor did not misunderstand him. He said his map showed a straight South line—I asked him if he got over in the fence, and ran South with the fence, straight South, it would put him to the gear wheel; and he said it would.

The Court:

Go ahead.

Mr. Trammell:

Q. What was your understanding of the question, and what you answered in that regard?

A. I understood him to ask me how far East of my point "B" I would hit if I ran it 1 degree further East?

Q. Well, now what course did you run from "I" to "B"?

A. South 1 degree 3 minutes East.

Q. On your measurement?

A. Yes.

Q. Do your measurements vary in that respect?

A. Yes.

Q. What would be South on one instrument would vary on another instrument?
A. Yes.
Q. Have you calculated the acreage?
A. Yes.
Q. How much in there?
A. 70.02 acres."

Cross Examination.

"Q. Ever since you got the ratification, you have claimed 70 and some odd acres, instead of 68
206 acres; haven't you?
A. We calculated it at 70.02 acres.
Q. Your map shows that this line runs straight South; doesn't it?
A. No, sir.
Q. The line isn't drawn that way?
A. It shows the bearing right there.
Q. Do you mean to say that beginning at "I", and running straight South would put you over in Haynes' field?
A. Yes.
Q. That is what you are swearing to the Court?
A. Yes."

"It is stipulated that the Empire Gas & Fuel Company had a permit to do business in Texas and that the Empire Oil & Refining Company has a permit to do business in Texas."

"It is further stipulated that Empire Gas & Fuel Company and its successor in title, Empire Oil & Refining Company, said latter company having succeeded to all the title of the former company in and to said oil and gas leases, took possession of the land described in the oil and gas lease and the correction oil and gas lease, and drilled for oil thereon and has produced and is now

207 producing oil from said land and has paid the rentals and royalties therein provided. It is further stipulated that none of the parties to this lawsuit have drilled any wells on the strip of land involved in this controversy."

"Except for some dates we want to put in we rest."

Complainant Rests.

Counsel for Defendants:
"We offer in evidence patent from the State of Texas to M. Cartwright, assignee of George A. Thomason, being EXHIBIT No. 24."

The Court:
The exhibit is admitted in evidence.

(Exhibit No. 24 is the same as Exhibit No. 1, and will not be recopied at this place.)

Counsel for Defendants:
"We offer in evidence deed from Matthew Cartwright to Benjamin N. Hampton, being EXHIBIT No. 25."

The Court:
The exhibit is admitted in evidence.

(Exhibit No. 25 is the same instrument as Exhibit No. 2, and will not be recopied at this place.)

Counsel for Defendants:
"We offer in evidence deed from Mr. Cartwright to B. N. Hampton, being EXHIBIT No. 26."

The Court:
The exhibit is admitted in evidence and is in words and figures as follows:

208 Warranty Deed.

M. Cartwright to B. N. Hampton.

Dated: June 16, 1851.

Filed: .....

Recorded: Vol. C, page 256, Deed Records, Gregg County, Texas.

The State of Texas,
County of Upshur.
Know All Men by these Presents:

That I, Matthew Cartwright of said State and County of San Augustine, for and in consideration of the sum of Ten Dollars to me in hand paid the receipt whereof is hereby fully acknowledged.

Have granted, bargained, and sold and by these presents do grant, bargain, sell, alien, convey and deliver unto Benjamin N. Hampton, his heirs and assigns forever the following described land, to-wit:

Six hundred and forty acres, headright of Jessee T. Bullock, situated in said county and state aforesaid secured to me as assignee of said Bullock by patent dated at the City of Austin 9th May, A. D. 1851, No. 89, Vol. 5; six hundred and forty acres of land the headright of Robert Burton. Situated in said State and County, secured to me as assignee of said Burton by Patnet No. 818, Vol. 3, issued at the City of Austin, 10th May, A. D. 1851. Three Hundred and twenty acres of land the headright of Carl Rhodes situated in the said State and County secured to me as assignee of said Rhode by Patent No. 645, Vol. 6, issued at the City of Austin 13th May, A. D. 1851, together with all and singular the hereditaments and appurtenances unto the same belonging.

To have and to hold the same unto said Benjamin N. Hampton, his heirs and assigns forever against the claim of myself, my heirs or assigns and all persons whatever claiming by or through me.

In testimony whereof I have hereunto set my hand and seal using a scroll for seal this 16th day of June, A. D. Eighteen hundred and fifty-one (1851).

(Seal) M. CARTWRIGHT.

Witnesses:

C. C. GALLOWAY,
O. E. ROBERTS."

(Acknowledgment.)

209 Counsel for Defendants:

"We offer in evidence deed from B. N. Hampton to A. Moseley, being EXHIBIT No. 27."

The Court:

"The exhibit is admitted in evidence and is in words and figures as follows:

"Warranty Deed.

B. N. Hampton to A. Moseley.

Dated: April 6, 1853.

Filed: .....

Recorded: Vol. D, page 499, Deed Records, Upshur Co., Texas.

The State of Texas,
County of Upshur.
Know All Men by these Presents:

That I, Benjamin N. Hampton, of the County of Hopkins in the State of Texas, for and in consideration of the sum

of Three Thousand Seven hundred and eighty dollars to me in hand paid by Augustus Moseley, the receipt whereof is hereby acknowledged have this day bargained, sold and conveyed and do hereby bargain, sell and convey unto the said Augustus Mosely all that tract or parcel of land, situated and described as follows, to-wit:

In Upshur County on the waters of Moodies Creek about fourteen miles South from the town of Gilmer described as follows, to-wit:

Beginning at the NE. corner of Survey No. 173 made for B. N. Hampton, Administrator of the estate of George Hampton, dec'd, a stake from which a pine bears S. 37 deg. W. 2-2/10 vrs. and another pine bears S. 26 deg. E. 12-2/10 varas;

Thence West at 2850 varas a stake at the NW corner of a survey made for Benjamin N. Hampton, Admr. of the estate of James Roark, dec'd., N. 174 a stake from which a black oak bears S. 34½ deg. E. 11 vrs. a black oak bears S. 33½ deg. W. 6 varas;

Thence South at 1900 vs. the SW. corner of said survey No. 174 a stake from which a pine bears S. 87 deg. E. 7 vs. a red oak bears N. 61 deg. E. 8 8/10 varas;

Thence East at 1900 varas to a stake;

Thence South at 1900 vrs. a stake from which a pine bears S. 81 deg. E. 1 6/10 varas and another pine bears S. 11 vs.;

Thence East at 950 varas a stake on the South East corner of Survey No. 175;

Thence North 3800 varas to the place of beginning, containing twelve hundred and eighty acres of
210 land and included survey No. 173, containing two hundred and forty nine acres; survey No.

174 containing one hundred and eighty eight acres of land, and the East half of survey No. 175, containing three hundred and twenty two and two-thirds acres of land, of the Headright of Haden H. Edwards, together with all and singular the rights, members, hereditaments and appurtenances to the same belonging or in anywise incident or appertaining.

To have and to hold said premises hereinbefore described unto the said Augustus Mosley, his heirs and assigns forever and I hereby bind myself, my heirs and assigns forever and I hereby bind my executors and administrators to warrant and forever defend the titles to said premises above described unto the said Augustus Moseley, his heirs and assigns forever.

In testimony whereof I have hereunto set my hand and seal using a scrawl instead of and for a seal on this sixth day of April in the year of Christ one thousand eight hundred and fifty three the, word South enterlined before signing.

(Seal) B. N. HAMPTON.

Test:

HEZEKIAH BARNES."

(Acknowledgment.)

Counsel for Defendants:

"We offer in evidence deed from A. Moseley to Alexander Rogers, being EXHIBIT No. 28."

The Court:

"The exhibit is admitted in evidence."

(Exhibit No. 28 is the same as Exhibit No. 4, and will not be recopied at this place.)

Counsel for Defendants:

"We offer as EXHIBIT No. 30, etc., various deeds from the heirs of Moseley to B. F. Phillips, dated in 1935 and 1936."

Counsel for Complainant:

"We object."

Counsel for Defendants:

"We offer them on the theory that if the East half that was surveyed could be held to the 880 yards
211 .. in our conveyance, then the Moseley would be left, as we view it, with the balance of that distance in there; so, in order to make our title perfect, even over to the Bozemans, we have six quitclaim deeds from each one of the Moseley children into B. F. Phillips, and from B. F. Phillips to our man. So, if the conveyance did not cover that entire distance in there, we would have the title out of the Moseley heirs, as well as out of the other people."

Counsel for Complainant:

"We object. The conveyance very clearly covers the East half of the survey."

The Court:

"The objection is overruled."

Counsel for Complainant:

"We except. May we have the same objection and exception to all instruments?"

The Court:

"Yes."

Counsel for Defendants:

"We offer in evidence quitclaim deed from Mace Moseley to B. F. Phillips, et al., being EXHIBIT No. 30.

The Court:

"The exhibit is admitted in evidence and is as follows:

"Quit Claim Deed.

"Mace Moseley, et al., to B. F. Phillips.

Dated: January 21, 1935.

Filed: January 24, 1935, at 3 P. M.

Recorded: Vol. 176, page 392, Deed Records, Gregg County, Texas, File No. 820.

The State of Texas,
County of Gregg.
Know All Men by these Presents:

That Mace Moseley, Holt Moseley and wife,
212 Edith Moseley, of the County of Knox and State of Texas, for and in consideration of the sum of twenty-five No/100 dollars to us in hand paid B. F. Phillips of the County of Gregg and State of Texas, the receipt of which is hereby acknowledged, do by these presents bargain, sell, release and forever quitclaim unto the said B. F. Phillips, his heirs and assigns, all our right, title and interest in and to that certain tract or parcel of land lying in the County of Gregg, State of Texas, described as follows, to-wit:

A part of the Geo. A. Thomason survey and more particularly described as follows, to-wit:

Beginning at the SE. corner of the Geo. A. Thomason survey;

Thence N. along the E. line of said survey to the N. E. corner of said survey;

Thence W. with the N. line of said survey 950 vrs. to a point for a corner;

Thence S. to the S. line of said survey for a corner, said corner being 950 vrs. W. of the SE. corner of said survey;

Thence W. with the S. line of said survey to a point for a corner which is 950 vrs. E. of the SW. corner of said survey;

Thence N. to a point in the N. line of said survey which is 950 vrs. E. of the NW. corner of said survey;

Thence E. with the N. line of said survey to the place of beginning.

To have and to hold the said premises, together with all and singular the rights, privileges and appurtenances thereto in any manner belonging unto the said B. F. Phillips, his heirs and assigns, forever, so that neither we, the said grantor nor our heirs, nor any person or persons claiming under us shall at any time hereafter, have, claim or demand any right or title to the aforesaid premises or appurtenances, or any part thereof.

Witness our hands at Knox City, Texas, this 21st day of January, A. D. 1935.

MACE MOSELEY,
HOLT MOSELEY,
EDITH MOSELEY."

(Acknowledgments.)

213 Counsel for Defendants:

"We offer in evidence quitclaim deed from Margaret Moseley Grimmer Powell, et vir. to B. F. Phillips, being EXHIBIT No. 31."

The Court:
"The exhibit is admitted in evidence."

(The quitclaim deed is signed by Margaret Moseley Grimmer Powell and S. J. Powell, and B. F. Phillips is named as grantee. It is dated January 21, 1935; filed for record January 24, 1935, and recorded in Volume 176, page 393. The metes and bounds description is the same as that contained in Exhibit No. 30 above and, for the purpose of shortening the record, the deed is not copied in haec verba.)

Counsel for Defendants:
"We offer in evidence quitclaim deed from Ben Moseley, et al. to B. F. Phillips, being EXHIBIT No. 32."

The Court:
"The exhibit is admitted in evidence."

(The quitclaim deed is signed by Ben Moseley, Zoa Moseley, Judson Moseley and Ellen Moseley, and B. F. Phillips is named as grantee. It is dated January 17, 1935; filed for record January 24, 1935, and recorded in Volume 176, page 395, Deed Records of Gregg County, Texas. The metes and bounds description is the same as that contained in Exhibit No. 30 above, and, for the purpose of shortening the record, the deed is not copied in haec verba.)

Counsel for Defendants:
"We offer in evidence quitclaim deed from Minnie Moseley Ware, et vir, to B. F. Phillips, being EXHIBIT No. 33."

The Court:
"The exhibit is admitted in evidence."

214 (The quitclaim deed is signed by Minnie Moseley Weir and Charlie Weir, and B. F. Phillips is

named as grantee. It is dated January 18, 1935, filed for record January 24, 1935, and recorded in Vol. 176, page 396 Deed Records of Gregg County, Texas. The metes and bounds description is the same as that contained in Exhibit No. 30 above, and, for the purpose of shortening the record, the deed is not copied in haec verba.)

Counsel for Defendants:

"We offer in evidence quitclaim deed from A. W. Moseley, et ux. to B. F. Phillips, being EXHIBIT No. 34."

The Court:

"The exhibit is admitted in evidence."

(The quitclaim deed is signed by A. W. Moseley and Mrs. Nadine Moseley, and B. F. Phillips is named as grantee. It is dated January 16, 1935, filed for record January 24, 1935, and recorded in Vol. 176, page 398 Deed Records Gregg County, Texas. The metes and bounds description is the same as that contained in Exhibit No. 30 above, and, for the purpose of shortening the record, the deed is not copied in haec verba.)

Counsel for Defendants:

"We offer in evidence quitclaim deed from Boyd Moseley, et ux. to B. F. Phillips, being EXHIBIT No. 35."

The Court:

"The exhibit is admitted in evidence."

(The quitclaim deed is signed by Boyd Moseley and wife, May Moseley, and B. F. Phillips is named as grantee. It is dated January 19, 1935, filed for record January 24, 1935, and recorded in Vol. 176, page 399-400, Deed Records Gregg County, Texas. The meters and bounds description is the same as that contained in Exhibit No. 30

above, and, for the purpose of shortening the record, the deed is not copied in haec verba.)

Counsel for Defendants:
"We offer in evidence quitclaim deed from Annie Moseley Jordan, et vir. to B. F. Phillips, being EXHIBIT 36."

215 The Court:
"The exhibit is admitted in evidence."

(The quitclaim deed is signed by Annie Moseley Jordan, et vir. and B. F. Phillips is named as grantee. It is dated January 22, 1935, filed for record January 24, 1935, and recorded in Vol. 176, page 400 Deed Records of Gregg County, Texas. The metes and bounds description is the same as that contained in Exhibit No. 30 above, and, for the purpose of shortening the record, the deed is not copied in haec verba.)

Counsel for Defendants:
"We offer in evidence quitclaim deed from W. Howard Moseley, et al. to B. F. Phillips, being EXHIBIT No. 37."

The Court:
"The exhibit is admitted in evidence."

(The quitclaim deed is signed by R. L. Moseley, W. H. Moseley, Effie Moseley, E. J. Moseley, Minnie Moseley, Chas. Moseley, Ludie Moseley, Agnes Conner and A. B. Conner, and B. F. Phillips is named as grantee. It is dated January 15, 1935, filed for record January 24, 1935, and recorded in Vol. 176, page 389 Deed Records of Gregg County, Texas. The metes and bounds description is the same as that contained in Exhibit No. 30 above, and, for

the purpose of shortening the record, the deed is not copied in haec verba.)

F. E. ROGERS, a witness produced by defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Defendants:

"My name is F. E. Rogers and I am one of the defendants in this suit. My father's name was Alexander Rogers. He was the same Alexander Rogers who acquired the East half of the Thomason Survey from Moseley.

My father died in 1891. After the death of my father the heirs made a partition of the land among
216 themselves. Four boys were living at that time. The east half was rated as 320 acres in the deed.

When we went to partition the same, we employed J. H. Simmons to make a survey. I knew Mr. Simmons and Mr. Simmons is the same man who surveyed out the West half as testified by Mr. York. We employed him a long time after 1880 when he had established the red oak and the post oak tree.

When he came out to make the survey, I went with him. We four boys were the chain-carriers.

Q. What did you say to Mr. Simmons, and what did he say to you, about the partition of the land, and how you would partition it?

Counsel for Complainant:

May we have an objection to all of this as irrelevant and immaterial, and incompetent in view of the calls in the deed, which call from a point to a point, the Northwest corner of our tract calling for an adjoinder of the Wiley Davis tract outside of this land? It varies the terms of a written instrument.

The Court:
The objection is overruled.

Counsel for Complainant:
We except; and may we have a general objection and exception to all that, so we need not repeat it?

The Court:
Yes.

(Direct Examination Resumed.)

Counsel for Defendants:
Q. Tell what you said to Mr. Simmons.
A. I asked him if he could do some survey-
217 ing for us; and he said he could, and came down. And he said: 'Do you know of a definite corner that we can start from.'"

Counsel for Complainant:
"We object—"

The Court:
"It was in fact a partition, wasn't it?"

(Direct Examination Resumed.)

Counsel for Defendants:
"Mr. Simmons went to the Northeast corner of the old home place and he found the markers that looked like they had been there for ages and ages. That is the Northeast corner represented by the fence corner up there at the Northeast corner of the 25 acre tract. If this map (Exhibit No. 14) represents the 320 acres we began at the Northeast corner.

I told him I wanted him to divide that land into four 80 acre blocks. He ran West 440 yards and then ran South what we would term one-half of the ground, 880 yards I believe. He then ran back to the East line and

established that tract as Block No. 1. That made a block 440 yards by 880 yards and that was Block No. 1 to W. H. Rogers."

Counsel for Complainant:

"Of course nothing in the field notes indicated that, and we object for the reasons stated."

The Court:

"I understand. Your objection and exception goes separately to all this character of testimony."

(Direct Examination Resumed.)

Counsel for Defendants:

"Mr. Simmons then came back and started to surveying off Block No. 2, which was the J. F. Rogers tract. He came back to the North line and ran over 440 yards for the 80 acre marker and he said 'Boys, you have got a chain here left over there,' and my two oldest brothers said:

'We will just keep that like it is.'. We were using
218 that for a road at that time of year. We had sold the mill but the road was still there. That is at the Northwest corner.

He drove his stake right at 440 yards and then he went South 880 yards. He came down to the half way point and drove a stake in the ground there. He just put in a small piece of green pine temporarily at that point. He then went over and surveyed out the old home place for myself and my brother, J. W. He got that all in the field notes and went home. The old man was old, and it was several days before he wrote up the deeds, then, when he delivered the deeds, we carried them to W. E. Foshee, a Notary Public in Gladewater, and signed them up. My older brother, John, and myself were single; and the other two boys were married. They had homes on those blocks and we were single; and we just blocked ours together.

We two single boys took the South end. That stake that Mr. Simmons drove at the Southwest corner of the J. F. Rogers tract and the Northwest corner of mine and my brother's tract was where the old gear wheel is now.

Q. Here is the gear wheel right here.

Counsel for Complainant:
"We object to all those stakes at the gear wheel as not being called for in any instrument."

The Court:
"Yes."

"I do not know what became of that stake that was placed there by Mr. Simmons at the time he made the survey. There is a pinion shaft out of an old sawmill there now. It has been there a long time.

219 Later on I sold my tract of land to Burnett. Burnett sold to Evans and it came on down until King got it. We did not have any fences at the stob at the Northwest corner and Southwest corner of the tract. We did not later put any fences. The South part was later sold to Pinkney Davis and he fenced over to the gear wheel. He then fenced the trees along there and made a pasture. South of the gear wheel and West of the gear wheel in the old roadway is where the Z. M. Simmons well is located. It is located East of the Sheppard fence. My nephew had a calf pasture in there running North from the stob. His name is J. E. Rogers, who is called Dink. At the time I sold my tract of land to Burnett, I did not point out to him anything with reference to the gear wheel. I just made a deed to him to the 880 yards as I had it. He is not the man who put the fence there but Pinkney Davis got ahold of it and put the fence in.

Since the division between the heirs and the establishment of the 440 yard corner at the North and the estab-

lishment at the corner where the gear wheel is located, a road has been open for the use of anyone who wanted to travel it.

To my own knowledge, J. E. Rogers, Mrs. Waskom and Mrs. L. J. Rogers never claimed that road as against the children of Alexander Rogers. Up until the time the Empire filed this suit I had never known of anyone claiming this road as against us.

At the time Mr. Cox came over there to see me I do not know whether he had an abstract or not. He had some documents and papers and an additional lease. He said the ratification was identical with the Chandler lease. I looked at the paper and read down to where everything was reduced to feet and did not figure it to see if it was correct. Mr. Cox said: 'This is identical,—the same thing as the Chandler lease, but reduced to feet, and covers the same acres, and covers the same land.' I had no interest in the Dink Rogers tract as surveyed by Mr. Simmons. That had been settled."

Cross Examination.

By Counsel for Complainant:

"We did not have much discussion about what was in the lease. I told him the lease was supposed to be 440 yards and so many yards this way and I said, 'your lease now is in feet. I do not know if that is correct or not.' Ben Cox and Dink Rogers left the house but I do not know where they went. I do not know if they came back together. I did not see them after that. I did not see the abstract. I said to Dink: 'if this is the same as the Chandler lease, I see no objection to your signing it.' I told Dink, 'I do not know whether that inclusive clause was in there or not.' If the inclusive clause was in the part that Dink was leasing I had nothing to do with it. I do not know whether I told him about the clause or not. I was with them about ten minutes. They then came to my house and stood on the front porch and talked five or

ten minutes. I did not go to Dink's house. My house was about two and a half miles from Dinks. Dink and Ben Cox came to my house and I do not remember whether Patterson was there.

When we had this land surveyed, Mr. Sim-
221 mons did not survey all around it but surveyed all around the North end. He began at the Northeast corner and surveyed West 440 yards and then came South 880 yards and ran back East 440 yards and made a deed to Block 1 to W. H. Rogers from those field notes.

He did some extra surveying before he made the deed. He then cut off J. F. Rogers tract, which is 440 yards East and West and 880 yards North and South.

I knew where Wiley Davis lived. I knew where the pine tree stood in his Northeast corner. It stood out Northeast of the school house. I know where the old road jogged around the pine tree. When they cut the road up there the road came almost to the pine tree, I guess. I do not know when the school house was built up at the Northwest corner of the land. It was built after the partition, I think. I knew where it was located. I did not help cut the road out to the school but I hired some men to work from a certain point. Wiley Davis cut from here to where he had his fence. The Gladewater Highway shown on Exhibit No. 14 comes across about the middle of the F. E. Rogers tract, as indicated on the map. The Wiley Davis land is North of the highway. He had the tract North of the highway that the school house was later put on.

I hired somebody to help cut the road out North of the highway about half way between the highway and the two acre block there. We had a fence here. The mill was North of the highway and I have marked it with an X. The mill and the house were both North of the highway. We had a road along here that turned out from the Longview-Gladewater road and came through the woods and went out to the Wiley Davis land. It was
222 the Victory land then. The road was closed to the Northwest corner of the Wiley Davis tract

and ran diagonally across the Davis land. Davis kind of intimated he did not like it too well about the log trains coming across his land and we cut the road through here. The road that Davis had cut out came from the highway up here. Not quite to the 2 acre tract. We cut the road out and went up to about where the school house was afterwards put, following along Davis' East line. That was before the partition. I knew where Davis' East line was. There were marked trees there. There were marked trees along Davis' East line and our West line. Those trees were cut down when I built the road. They were right in the road as I cleared it out. That pine tree died and caught fire and burned up. It is a big pine that represented the Northeast corner of the Wiley Davis tract and it is not there now. I do not believe anybody can find the corner now. If the road that Davis and I and the others had cut out had gone on straight North to the North line of the Thomason Survey and continued on North it might have run over the pine tree. The pine tree was about seven feet from where the pine knot represented the corner.

Mr. Simmons only surveyed the center line of the 160 acres partitioned to me and my brother and wrote the balance up from the deed.

Q. But surveyed out the North tract?
A. He surveyed this line here.
Q. This is the Bozeman tract?
A. Yes.

223 "My father deeded the land to my mother. Louisa, and four of their children were living at the time of the partition. The children living were W. H., J. F., John and myself. J. W. Rogers is dead. He did not have any children. Frank Rogers is dead and left a son, J. E. Rogers, and a daughter, Elvie Waskom, and his wife, Mrs. L. J. Rogers. J. F. Rogers died in April or May, 1899, not long after the partition.

That road that I cut out from the Gladewater Highway along Wiley Davis line and my line was originally about twenty feet wide. It was just a country road. Wiley Davis fenced along the East side of it but not at that time. He fenced it later. Wiley Davis fenced along his East line and on the West side of the road. Dink and his Uncle, John Boles, fenced along the East side of the road. They fenced it after J. F. Rogers died but I do not know just how long. I knew the land was clear and fenced.

I have lived all my life not very far from the tract. I knew it was cleared out. I expect the road was fifty or sixty feet wide between Dink's West fence and Davis fence in the old days. It was never fenced West of the 440 yard measurement that Simmons made. Part of the fence J. W. Mings built there on the line of the two acres is still there. I know when the two acre tract in the Northwest corner was sold. I had nothing to do with the sale. I guess it was surveyed. Dink was not of age at that time but there is no question about that. I know where the post oak tree is at the Northwest corner. The post oak tree marked the Northeast corner as called for by the field notes. I do not think the line runs West from there 147 feet. I do not think the deed calls for it that way. The deed says it runs 953 varas West
224 of the Northeast corner. That puts it on Simmons 440 yards. I had nothing to do with writing the deed to J. W. Mings but I have read it but not recently. I do not know just when.

I do not know about the North line being 147 feet from the post oak. I do not know about the post oak. I know there are some post oaks in there but I do not know whether they are at the corner. There are a bunch of post oaks there. I do not know if there is a post oak marked there at the fence. I am not disputing that there are post oaks there that would fit the bearing. The deed calls for a black jack tree at the Southwest corner and I saw the black jack tree at the edge of the road.

I know when Doc sold off 25 acres to Mrs. Waskom. I did not know or hear that he made the corner up there 487 vrs.

For a good while I was gone and not around here. I was East of Gladewater, near Longview, but I came back to visit my brother and family.

Simmons made out the deeds after he made the survey. It seems to me that he made out the deeds about a week or ten days after he made the survey. I believe he made the survey in a day. There was no fence around the old home place at that time except a horse lot and a garden and an orchard. It was fenced but not connected with the farm. The farm was South.

Simmons did not mark anything on the East line of the survey except at the Southeast corner. He marked a tree here and there and he put a stake in the ground over here. He marked a big red oak at the South-
225 east corner and he put a stake at the North-west corner. He put a stake at the Southwest corner. I do not remember whether he put a stake between Frank's tract and Doc's tract."

Re-Direct Examination.

By Counsel for Defendants:

"I never saw Mr. Cox after the ratification deed was signed. I did not see him when Dink talked to him."

Re-Cross Examination.

By Counsel for Complainant:

"I have seen the two acre tract out of the Northwest corner of the J. F. Rogers tract lately and it is fenced where it used to be fenced. It is now fenced right about where it had been fenced for a long time. There is a fence on the West side of it next to the road. That fence is now where it stood practically all the time. I do not know whether it has been moved or not. I expect that fence on the West side is about fifty feet East of the pine tree that stood at the Northeast corner of the Davis tract."

Re-Direct Examination.

By Counsel for Defendants:

"I know where Dink built his house, South of the two acres and it is a good piece from the road. I think the front of it would be thirty-five feet from the road. There is a filling station down there and it may be about at the corner of the East line.

Mr. Simmons' chain measured out in yards. That is the only surveying I ever did."

226 M. H. HACKNEY, a witness produced by defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Defendants:

"My name is M. H. Hackney and I live at Longview and am a land surveyor and have been a surveyor for seventeen years. I have been surveying in East Texas a little over five years.

I have had occasion to survey land in and around the Thomason and Rhodes Surveys in Gregg County. I had occasion to survey out the East half and the West half of the Thomason Survey, as it is located out on the ground.

Q. It has been agreed that the red oak tree on the East line of the Thomason Survey at point "B", as shown on that map, represents the East line of the Thomason Survey, and that the Northeast corner is located North of that line at the point shown. This is Exhibit No. 14. *We further agreed that the East dividing line as established on the ground, is at a point running through the red oak, at the Northeast corner of the M. O. Sheppard tract.*

Now, that has been stipulated."

"I have had occasion to survey North from the Southeast corner of the M. O. Sheppard tract and the Northeast corner is designated by a red oak tree. I ran my

line from the post oak tree at the Southeast corner of the M. O. Sheppard tract North. This line which I ran North goes a little bit West of the red oak tree at the Northeast corner of the M. O. Sheppard tract
227 and will pass the Phillips well to the West a distance of about 18.9 feet. The red oak is about one-half vara East of the line I ran."

By Counsel for Defendants:

"Q. The East half and the West half of the survey *is divided by a line running North from the Northeast* corner of the M. O. Sheppard 36 acres tract. Now, extending that line on North, as called for, which direction will it be from the Phillips well, and how far?"

A. You ask if you produce the line from this corner through the red oak?

Q. Yes, right on North?

A. I could not answer, because I don't place that line through that red oak. I ran North from this post oak, the Southeast corner—

Q. Yes.

A. Which places the line a little bit to the West of the red oak.

Q. But it still will be which side of the Phillips well?

A. On the West.

Q. On the West side?

A. Yes.

Q. And how far?

A. 18.9 feet.

Q. All right. That is what I thought you said. And if you produce it from the red oak on North, it would still be further West of there, because the red oak is a little bit West of the line you ran?

A. It is East of it.

228 Q. East of it, about how far East?

A. The red oak is approximately in a true East direction. It is mighty little bit to the East. I would not say over half a vara.

Q. Then it is about 16 feet from the point East of the red oak?

A. Yes.

Q. Then if we have agreed that the red oak is the dividing line, it would be about 16½ feet East of the dividing line?

A. Yes.

Q. Then, producing that line on to the North, would not come anywhere East of the Phillips well?

A. No.

Q. As located on the ground?

A. No.

Q. Producing that line on North from the red oak tree would be how far West of the gear wheel, as located on the ground?

A. Well, approximately 66 feet.

Q. The line that you made from the post oak tree is what I am talking about?

A. If I ran North from this post oak?

Q. Yes.

229 A. I am 92 feet West of the bevel gear.

Q. If you run North from the post oak?

A. Yes.

Q. Now, the red oak is a little bit East of your line?

A. Yes.

Q. Did you survey the line from the red oak tree on the East line of the agreed boundary line there, did you move the line across to the East—West to the bevel gear?

A. Yes."

"I surveyed out the partition tracts as I found them on the ground. In surveying out the tract partition to J. W. Rogers and F. E. Rogers, being the King tract, the deed calls to run 880 yards to the West and I
230 ran that line. In running that line 880 yards to the West it came within one hundredth of a yard short of the bevel gear. Beginning at the red oak tree on the agreed East boundary line and running West 880 yards, I came within one hundredth of a yard of the bevel gear. I ran a traverse line from the bevel gear Northward. I did not detail all the evidence along that

line. In 1932, as I recall, in a reconnaissance look-around there was evidence of a fence running from the North to the bevel gear."

Cross Examination.

By Counsel for Complainant:

"I did not put that fence line down running North from the bevel gear but I said that was reconnaissance,—just a look around. I was not making a survey at that time. As I said, I did not make a survey at that time and I would not remember just how that fence stood up there.

I surveyed from B on Exhibit No. 14 to the bevel gear. I detailed the area immediately West of the bevel gear. That survey was in 1935. I do not recall whether there was a slush pit at the Southwest corner of the J. F. Rogers tract. It seems that there was but I would not say for sure. I found marked trees. I found a 36 inch red oak with three hacks on the West. It was North 28 degrees 35 minutes west 43.6 feet from the bevel gear. Those were some trees put in the fence line. I located a ten inch post oak with an X on it West of the bevel gear and there were references to an inch and a half iron pipe. The iron pipe was South 89 degrees 1 minute 23.53 vrs. from the bevel gear and there was
231 no delineation allowance to be taken in on the instrument. That would be almost West. That is all of the surveying I did on that particular tract.

I did not try to survey out the Rogers partition."

SETH DAVIS, a witness produced by defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Defendants:

"My name is Seth Davis and I live near Forney and am a farmer. I was born in Gregg County and am a half

brother of Dink Rogers. I lived on the old Rogers homestead with Dink and his mother for about a year. It was in 1934 or 1935.

I was out there with them in the old days shortly after the partition was made.

Q. Did you have occasion to do anything with reference to the Southwest corner of the J. F. Rogers tract, as it had been partitioned?

A. Nothing more than my mother asked me to go out there, and put this wheel axle down in the ground for a corner post."

Counsel for Complainant:

"We object to all this. It is not called for in the field notes."

The Court:

"Overruled."

Counsel for Complainant:

"We except."

232 By Counsel for Defendants:

"Q. Did you locate that wheel at any spot down there?

A. Right at the corner.

Counsel for Complainant:

"We object to that as a conclusion.

The Court:

"Sustained."

By the Court:

"Q. Was the place marked where you took this to?

A. There was a stob there."

(Direct Examination Resumed.)

By Counsel for Defendants:

"I placed the wheel right at the side of the stob. My mother asked me to do that. She said that she wanted me to do that so she could tell where the lines were. Dink went with me. He was a kid though and younger than I was. The sprocket wheel was there in 1934 or 1935. We brought it from the mill. It was still in the ground in 1934 at the same place. I do not know who claimed the land West of the sprocket wheel any more than my mother wanted me to go out there for her and put this down for a corner."

Cross Examination.

By Counsel for Complainant:

"I was not there when the partition was made. All I know about it was putting this wheel axle down there. My mother told me to put it at the corner where she showed me. She showed me a day or two before where to put it. There was nothing there other than the post. I do not know whether it was a pine or a hickory or what.

233 Counsel for Complainant:

"We object to this testimony as hearsay, and immaterial, and irrelevant, and incompetent.

The Court:

"You say that was shortly after the partition was had?

A. Yes.

The Court:

Objection overruled.

Counsel for Complainant:

We except. And we further object to it as being in derogation of the deed Mrs. Rogers executed.

The Court:
Overruled.

Counsel for Complainant:
We except."

J. W. MINGS, a witness produced by defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Defendants:

"My name is J. W. Mings and I live at Marshall. I am the same J. W. Mings who at one time owned the 25 acres out of the Northeast corner of the Thomason Survey. I am also the same one who, at one time, owned a two acre tract out of the Northwest corner of the J. F. Rogers tract. At the time I purchased the two acre tract I fenced it. I have seen it in the last year or two, having passed by it. The fence is practically in the same place it was when I fenced it. I knew where
234 the school house tract was at the time. I also knew where the Sport tract was on the Northeast, which is now the Bouknight tract. I do not think there was a pine tree up there at the Southeast corner in those days. I judge that the Bouknight tract and the school house tract were about thirty-five or forty feet across the way from where I fenced the two acres. I did not measure it and that is just an estimate. I do not remember the old pine tree, if there ever was one there. There was a road going from my two acres on the South. The road went on South as far as the railroad. I think there was something that marked the Southwest corner of the J. F. Rogers tract. I do not remember anything about it."

Cross Examination.

By Counsel for Complainant:

"I bought the two acres in 1910, I believe. That is my recollection of it. I bought twenty-five acres from Mrs. Walker and I bought two acres from Mrs. Rogers. I do not recollect if there was a post oak at the Northeast corner of the 2 acre tract. I started my fence at the Northwest corner over by the road and fenced it up. My deed from Mrs. Rogers calls to begin at the Northwest corner and that is over there thirty-five or forty feet from the school house tract across the road. If there was a post oak tree called for at the Northeast corner, I fenced my corner there at that time. I ran South from there and fenced it up. The fence is partly there today. I have not looked at it. I have just passed the road and have not gotten out to examine it. The fences seemed to be like they were when I fenced it. I never knew of anyone claiming that two acres besides myself. I sold
235 it to R. M. Wood. The road has been graded and widened since then. It is considerably wider now than it used to be. At the time I went there and fenced it up there was a fence on the West side of the road. The lane ran up there on the West side of my tract and on the East side of the tract across the road and next to the school house. There was an old rail fence over on the West side and was apparently a good fence."

Re-Direct Examination.

By Counsel for Defendant:

"The deed to the two acre tract calls 'thence West 115 feet to the East side of the Union Grove Public Road with a black jack.' I fenced to the East side of the road. I never did claim anything except to the East side of the road as called for in the deed."

Re-Cross Examination.

By Counsel for Complainant:

"My fence at the Southwest corner of the 2 acre tract was about 35 feet from the fence across the road. The road was just an ordinary country road."

H. O. GOSSETT, a witness produced by defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Defendant:

"My name is H. O. Gossett and I live in Longview, Texas, and lived there in 1931. I took some pictures in about 1931 of the sprocket wheel. The pictures were taken just after the survey of the Empire lease. Those were the pictures I took. They represent the sprocket wheel as it was on the ground at that time. One
236 picture shows a man standing within one foot of the sprocket wheel. At the time I took the picture I followed the surveyor who measured from the red oak tree on the East line of the survey to the sprocket wheel. It was 880 yards. The surveyor was Horace Boyette."

J. E. SPORT, a witness produced by defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Defendants:

"My name is J. E. Sport and I live at Gladewater and have lived in Gregg County for forty-five years.

I owned at one time what is known as the Bouknight place, which joins the Wiley Davis place on the North. I knew that property out there from 1892 to the present.

In 1892 and the years following, I was acquainted with what was known as the Bozeman land and the Rogers land. I know where the post oak tree is at the Southeast corner of the M. O. Sheppard 36 acre tract. I know where the red oak tree is at the Northeast corner of the 36 acre tract.

Q. Extending that line on North to the Northeast corner of the Wiley Davis tract, at the Southeast corner of your tract, was there a tree at that point?

A. Yes. It was a pine tree. That pine tree represented the dividing line of the survey just like the oak tree did down South. I would judge that pine tree at the Southeast corner of my tract and at the Northeast corner of the Wiley Davis tract was 70 or 75 feet from the Mings fence as it was first fenced.

Q. The Mings fence as extending on South 23" about 70 or 75 feet from the pine tree, if it was extended on South, would it or not be close to where the old sprocket wheel is there?

A. Yes.

Q. Do you know where the sprocket wheel is?

A. Yes.

Counsel for Complainant:

We object to that as speculative, and not competent.

By the Court:

Q. "You are trying to say it was about on the line North and South with the sprocket wheel; that is your best judgment?

A. Yes.

I have known that sprocket wheel ever since I was over there. It has been there twenty-five or thirty years."

Q. What did it represent?

A. The dividing line of the Rogers subdivision.

Q. All right."

Counsel for Complainant:
"We object to that as a conclusion."

Counsel for Defendant:
"Q. I mean what is its reputation in that community there as to what it did represent?
A. It represented the dividing line between the Rogers subdivision."

Counsel for Complainant:
"We make the same objection."

The Court:
"Overuled."

238 Counsel for Complainant:
We except."

Cross Examination.

By Counsel for Complainant:
"I know where the school house was at the Northeast corner of the Wiley Davis tract. The school house was South of the pine tree. The school house did not go approximately where the pine tree was. A road came in there. At that time the road was between the tree and the school lot but the road was widened of course afterwards. The road made a little round turn and not an exact square turn. If the road had gone on up East of the Wiley Davis tract and made a square turn it would have gone South of the pine tree. The pine tree was North of the line and North of the School house line. The school house line was in the extreme Northeast corner of the Wiley Davis tract. The pine tree was in the joint line between the Hayden Edwards survey on the North and the Thomason Survey on the South. The school tract was not surveyed up to the Edwards tract on the North on account of the road which made a little bend there. I helped put the road there. The fences must

have been at least sixty or seventy feet apart but the road did not take up all the land, however. The road was cut out twenty-five, thirty or forty feet wide. It did not go plumb straight when it was originally cut out. Davis' fence was back ten, fifteen or twenty feet from the West line of the road. The road was fenced on the East when Mr. Mings bought and put in the orchard there. I do not remember when the road was fenced South of the Mings place. It has been quite a long while. The road has been recently widened. In 1935, the fences that were there were further than thirty-five
239 or forty feet apart. I put up the school house fence myself. A fence was put up from the Mings tract on the South to the Gladewater Highway. I do not remember the date it was built.

Wiley Davis had a fence on the West side of the road running clear up to the school house lot. I do not think, in 1930, before the road was widened, Davis and Rogers' fences were within forty-five feet of each other. I did not measure them. I was road overseer and people went over the road. In my judgment they were sixty or seventy feet apart. After the fences were put there the road was widened. I will say that the fences were at least sixty feet apart. I know where the Mings fence is on the East side. That is the part that remains and I do not think it has ever been changed.

There is a marked post oak tree at the Northeast corner of the Mings tract. It is the Northeast corner tract of the Mings 2 acre tract. We measured the distance from that tree on back West 147 feet. The 147 feet did not run out in the road as it was originally built. I do not know whether the fence at the Northwest corner of the Mings tract is now where it was originally built. By taking the Northeast corner of the Mings tract and measuring back 147 feet, the Northwest corner of the Mings tract would be found as it was originally located. The road did not run back to the Southeast as it does now. Originally, it started up where it is now and ran what I call to the South. It bears back a little to the Southeast

down about the Southeast corner where the fence is and that is not the way it originally ran. It now bends back a little to the Southeast. The road bends back very little to the Southeast from where it used to
240 run South. I never heard of Doc, Flavius and John Rogers claiming any strip along the West side of the tract. As far as I know J. F. Rogers and his family owned all of that Northwest tract up there to the road. I think it was theirs. That was always called Frank Rogers place.

I first heard of the gear wheel down there about twenty or twenty-five years ago. I did not put it there and do not know exactly when it was put there. All I know about it is that I went along there and saw it. It was almost in the road. The road wobbled quite a little bit.

The road did not originally run up against the Haynes fence because a heavy row of timbers had grown up in the old fence row. I know where the fence is now. I have not been over it in six, eight or ten months and do not know whether there are deep ruts along next to the fence. There was a sort of bad place there though.

The Rogers fence at that point was not straight. I do not think there was any bend in the fence. It ran just straight on by the gear wheel to the corner. There used to be an angle bar put in the pike, in the South edge of the road. Pinkney Davis put it there about thirty years ago. The road always ran on down there and turned across East of Mr. Haynes place about midway of the Haynes line South of the Rogers tract. The road ran South. It ran South and turned to the West and ran across Haynes land. There was an old trail going on down South though. The old road came on down from the school house clear on down South, approximately half way between the J. F. Rogers Southwest corner and the M. O. Sheppard tract. The road then turned
241 Northwest across the Haynes tract. There was always a big road there at the King tract. It was quite a distance from Haynes fence to King's fence.

There was not any fence on Haynes side after you turned South. There was a fence on the East.

I was with one of the surveyors when they made a survey. I was not with the surveyors when they set the gear wheel. I was with the surveyors when they surveyed from the post oak corner to the red oak corner and from the red oak corner up to the well. That was about two years ago. I was just going along. The surveyor came and wanted me to show him the Southwest corner post oak tree at the Southeast corner of the Sheppard tract. That was the Southwest corner of the Rogers tract on the South. That was the Southwest corner of the J. W. Rogers and F. E. Rogers tract. The surveyor ran from there with me to the red oak tree at the Northeast corner of the Sheppard tract. We then ran on in the same direction to the gear wheel and we ran from there West to the fence. I did not check his course.

Q. I think it is admitted that a line running North from the red oak at the Northeast corner of the Sheppard tract would strike a considerable distance West of the gear wheel?

A. I don't know about that. We ran from the red oak to the gear wheel.

Q. It is your recollection that he ran a course North from there?

A. Yes.

242 Re-Direct Examination.

By Counsel for Defendants:

"I do not know whether that was Mr. Rest trying to get the relative location of the gear wheel with the trees. He just had me to go and point out the Southwest corner to him, which I did. He then went to the red oak and to the gear wheel."

Re-Cross Examination.

By Counsel for Complainant:

"As I understand it, the Wiley Davis Northeast corner and Mrs. L. J. Rogers Northwest corner was a common corner."

J. H. SIMMONS, a witness produced by the defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Defendants:

"My name is J. H. Simmons and I live in Dallas. I am looking after the Z. N. Simmons lease, which lies immediately South and West of the gear wheel.

At the time and before the well was drilled I took some pictures at the place. The picture you handed me is one showing myself standing close to the road before the location was made. The location for the well is between the King fence and the Haynes fence. Exhibit No. 40 shows the road that runs between those fences. Exhibit No. 41 shows a picture of the Haynes and King fences. In Exhibit No. 40, I am pointing at the location and am looking South. Exhibit No. 41 shows the Haynes fence to the West where the other gentleman is standing and I am standing at the King fence. Exhibit No. 42 is a picture showing the road running North and
243 then swinging over to the East side of the fence. That is a portion of the same road going toward the North. The picture shows the Haynes house on the left and the Rogers fence through the timber on the right."

By the Court:

"Now, the picture No. 41. Where were you standing on the ground when you took that picture?

A. I was standing on the King West line with my hand on that fence line.

Counsel for Complainant:

"We object to that as a conclusion.

The Court:

"But the fence line is what he said. On the West line of the King tract."

By the Court:

"The fence line continues on down about 100 or 150 feet and corners at the bevel gear. This fence ran North and it ran down here about 150 or 200 feet and then cornered at the bevel gear and then ran East."

By the Court:

"Was there a fence going North from the bevel gear?

A. No, sir."

Q. That is the Haynes fence on your left there, is it not?

A. Across the way. This is the Haynes fence on the West.

By the Court:

"Where is the road, with reference to those two right East of the Haynes fence?

A. Right where I am standing. It is sort of cut away. It is down there; and right immediatly to my
244 West is the road here; and it goes North."

(Cross Examination.)

By Counsel for Complainant:

"There is also a red oak over next to the Haynes fence West of me. There are a number of old roads there but this is the oldest one. They seem to be about the same. They sort of go back and forth. The road is traveled one place one time and another place another time."

(Direct Examination Resumed.)

By Counsel for Defendants:

"On the left hand side of Exhibit No. 42 is the Haynes fence. The fence travels on North and swings to the road where it corners at the bevel gear, I presume about three or four feet East of the corner and then it swings right around it. I did not take a picture going North from the bevel gear. There was a house there with a front yard and I do not believe they had a fence there. On North of the bevel gear there was no fence. If I remember it, there was an old fence there but it was not kept up like this one South of the bevel gear. In Exhibit No. 42 the old road depicted wound around to the place of least resistance through the timber. Exhibit No. 41 shows the well South and West of the gear wheel and at the place I am pointing is the continuation of the original road South. Extending the road on North on the lease that Z. N. Simmons has would be an extension of the road on to the lease that Dunlap has.

Cross Examination.

By Counsel for Complainant:

"I am not a lawyer. I am the Simmons that went down to take the deposition of Mr. Rogers. My well is located at the place shown on the map and is between the fences.

They built the fence rows pretty straight and
245 then began putting the fences on the trees. The fence bears back to the West. The fence goes over West of the line running South from my well after the fence gets in the wooded section. The Haynes fence is straight along to the West. I did not pay much attention to the North of my well and North of the bevel gear. I do not think the fences left a wider place from the bevel gear West to the Haynes line than they did anywhere else because within about 100 feet of the highway is the warehouse and immediately behind the warehouse you

can see the remains of an old fence now that looks to be about where the bevel gear is. The warehouse is about midway between the bevel gear and the highway, the distance between the bevel gear and the highway being about 1500 to 2000 feet. I never saw the old wire in the trees running to the Northwest from the bevel gear. I never did see the old wires in the trees running North from the bevel gear where the fence left the bevel gear and angled off back toward the Northwest. The fence on the left of the picture taken looking North (being Exhibit No. 42) is the Haynes fence. The road is the one between the Haynes and King fences. The King fence would be still further over to the right of the picture and is not shown."

Counsel for Defendants:

"We offer in evidence EXHIBITS 38, 38-A, 39, 40, 41 and 42, being pictures."

The Court:

"The exhibits are admitted in evidence, and are found at the end of this statement of the evidence."

246 Re-Cross Examination.

By Counsel for Complainant:

"Exhibit No. 40 is looking South and I am pointing with my left hand to the location of my well. The Haynes fence is to the right of the picture. The point I am pointing at with my left hand is about 35 or 40 feet from the Haynes fence. The roads meander back and forth in between those trees and at the exact spot I do not know whether there is any road or not. The road would wash on one side and then they would get on the other side."

Counsel for Defendants:

"We offer in evidence as EXHIBIT No. 43, oil and gas lease from F. E. Rogers, et al., to B. P. Dunlap.

The Court:

"The exhibit is admitted in evidence and is as follows:

"Oil, Gas and Mineral Lease:

F. E. Rogers, et al., & B. P. Dunlap.

Dated: October 10, 1934.

Filed: October 19, 1934, 1:57 PM.

Recorded: Vol 170, page 602, Deed Records, Gregg County, Texas. File #9668.

This Agreement, made this 10th day of October, 1934, between F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, widow of J. F. Rogers, deceased, J. E. Rogers, joined by his wife, Ola Mae Rogers, Elvie (Rogers) Waskom, having been abandoned by her husband, Azzie Waskom, Lessor (whether one or more) and B. P. Dunlap, of 4412 Lakeside, Dallas, Texas, Lessee, Witnesseth:

1. Lessor in consideration of other considerations and ten dollars ($10.00) in hand paid, of the royalties herein provided, and of the agreements of lessee herein contained, hereby grants, leases and lets exclusively unto lessee for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and other minerals, laying pipe lines, building
247 tanks, power stations, telephone lines and other structures thereon to produce, save, take care of, treat, transport and own said products, and housing its employees, the following described land in Gregg County, Texas, to-wit:

Being all that certain lot, tract and parcel of land in Gregg County, State of Texas, in the Geo. A. Thomason Headright Survey, lying West of the West Bounary line of the J. F. Rogers tract of land as surveyed in the year

1899, and East of the West boundary line of the Alexander Rogers tract of land established in or about the year 1855, which line is also the East boundary line of the G. W. Clark and M. P. Haynes tracts of land, this lot, tract and parcel of land being more particularly described as follows, to-wit:

Beginning at an old steel shaft about 2" in diameter with an old bevel gear wheel on upper end, as a land mark stake set for the W. N-W. corner of a 176 acre tract of land and the S-W. corner of the J. F. Rogers tract of land by the surveyor on the ground in the year 1899;

Thence Northerly along the W. B. line of said J. F. Rogers tract of land to the N-W. corner thereof on the N. B. line of the said headright survey a distance of about 880 yards;

Thence West 66.89 feet to the N-E. corner of the Clark land which is also the N-W. corner of the Alexander Rogers original tract of land prior to the junior surveys thereof made in the year 1899;

Thence Southerly 880 yards along the East boundary lines of the Clark land and the Haynes land, which is also the West boundary line of the said Alexander Rogers land, to a $1\frac{1}{4}$" iron pipe stake set in the West boundary line of the said Alexander Rogers tract of land, the same being the S-W. corner of this tract;

Thence East 66.89 feet to the place of beginning and containing five (5) acres of land, more or less.

Save and Except about 2 acres of land conveyed to J. W. Mings by Mrs. L. J. Rogers, et al., by deed dated May 7, 1917, and recorded in Vol. 32, page 564, Deed Records of Gregg County, Texas.

2. Subject to the other provisions herein contained, this lease shall be for a term of ten years from this date (called "Primary term") and as long thereafter as oil, gas or other mineral is produced from said land hereunder.

3. The royalties to be paid Lessor are: (a) on oil, one-eighth of that produced and saved from said land, the same to be delivered at the wells or to the credit of Lessor into the pipe line to which the wells may be connected; Lessee may from time to time purchase any royalty oil in its possession, paying the market price therefor prevailing for the field where produced on the date of purchase; (b) on gas, including casinghead gas or other gaseous substance, produced from said
248 land and sold or used off the premises or in the manufacture of gasoline or other product therefrom, the market value at the well of one-eighth of the gas so sold or used, provided that on gas sold at the wells the royalty shall be one-eighth of the amount realized from such sale; where gas from a well producing gas only is not sold or used. Lessee may pay as royalty $50.00 per well per year and upon such payment it will be considered that gas is being produced within the meaning of paragraph 2 hereof; and (c) all other minerals mined and marketed, one-tenth either in kind or value at the well or mine, at Lessee's election, except that on sulphur the royalty shall be fifty cents (50c) per long ton. Lessee shall have free use of oil, gas, coal, wood and water from said land, except water from Lessor's wells, for all operations hereunder, and the royalty on oil, gas and coal shall be computed after deducting any so used. Lessor shall have the privilege at his risk and expense of using gas from any gas well on said land for stoves and inside lights in the principal dwelling thereon out of any surplus gas not needed for operations hereunder.

(4) If operations for drilling are not commenced on said land on or before one year from this date the lease

shall then terminate as to both parties unless on or before such anniversary date, Lessee shall pay or tender to Lessor or to the credit of Lessor in The First National Bank at Longview, Texas, (which bank and its successors are Lessor's agent and shall continue as the depository for all rentals payable hereunder regardless of changes in ownership of said land or the rentals) the sum of Five Dollars ($5.00) (herein called rental) which shall cover the privilege of deferring commencement of drilling operations for a period of twelve (12) months. In like manner and upon like payments or tenders annually the commencement of drilling operations may be further deferred for successive periods of twelve (12) months each during the primary term. The payment or tender of rental may be made by the check or draft of Lessee mailed or delivered to said bank on or before such date of payment. If such bank (or any successor bank) should fail, liquidate or be succeeded by another bank, or for any reason fail or refuse to accept rental, Lessee shall not be held in default for failure to make such payment or tender of rental until thirty (30) days after Lessor shall deliver to Lessee a proper recordable instrument, naming another bank as agent to receive such payments or tenders. The down cash payment is consideration for this lease according to its terms and shall not be allocated as mere rental for a period. Lessee may at any time execute and deliver to Lessor or to the depository above named or place of record a release or releases covering any portion or portions of the above described premises and thereby surrender this lease as to such portion or portions and be relieved of all obligations as to
249 the acreage surrendered, and thereafter the rentals payable hereunder shall be reduced in the proportion that the acreage covered hereby is reduced by said release or releases.

In this connection the above described premises shall be treated as comprising five acres, whether there be more or less.

5. If prior to discovery of oil or gas on said land Lessee should drill a dry hole or holes thereon, or if after discovery of oil or gas the production thereof should cease from any cause, this lease shall not terminate if Lessee commences additional drilling or reworking operations within sixty (60) days thereafter or (if it be within the primary term) commences or resumes the payment or tender of rentals on or before the rental paying date next ensuing after the expiration of three months from date of completion of dry hole or cessation of production. If at the expiration of the primary term oil, gas or other minerals is not being produced on said land but lessee is then engaged in drilling or reworking operations thereon, the lease shall remain in force so long as operations are prosecuted with no cessation of more than thirty (30) consecutive days, and if they result in the production of oil, gas or other minerals so long thereafter as oil, gas or other mineral is produced from said land. In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within one hundred fifty (150) feet of and draining the leased premises, Lessee agrees to drill such offset wells as a reasonably prudent operator would drill under the same or similar circumstances.

6. Lessee shall have the right at any time during or after the expiration of this lease to remove all property and fixtures placed by Lessee on said land, including the right to draw and remove all casing. When required by Lessor, Lessee will bury all pipe lines below ordinary plow depth and no well shall be drilled within two hundred (200) feet of any residence or barn now on said land without Lessor's consent.

7. The rights of either party hereunder may be assigned in whole or in part and the provisions hereof shall extend to the heirs, successors and assigns, but no change or divisions in ownership of the land, rentals or royalties however accomplished, shall operate to enlarge the obliga-

tions or diminish the rights of Lessee. No sale or assignment by Lessor shall be binding on Lessee until Lessee shall be furnished with a certified copy of recorded instrument evidencing same. In event of assignment of this lease as to a segregated portion of said land, the rentals payable hereunder shall be apportionable as between the several leasehold owners ratably according to the surface area of each and default in rental payment by one shall not affect the rights of other leasehold owners hereunder. If six or more parties become
250 entitled to royalty hereunder, Lessee may withhold payment thereof unless and until furnished with a recordable instrument executed by all such parties designating an agent to receive payment for all.

8. The breach by Lessee of any obligation arising hereunder shall not work a forfeiture or termination of this lease nor cause a termination or reversion of the estate, hereby nor be grounds for cancellation hereof, in whole or in part, save as herein expressly provided. If the obligation for reasonable development should require the drilling of a well or wells, Lessee shall have ninety (90) days after ultimate judicial ascertainment of the existence of such obligation within which to begin the drilling of a well, and the only penalty for failure to do so shall be the termination of this lease save as to ten (10) acres for each well being worked on and/or being drilled and/or producing oil or gas to be selected by Lessee so that each 10 acre tract will embrance one such well.

9. Lessor hereby warrants and agrees to defend the title to said land and agrees that Lessee at its option may discharge any tax, mortgage or other lien upon said land and in event Lessee does so, it shall be subrogated to such lien with the right to enforce same and apply rentals and royalties accruing hereunder toward satisfying same. Without impairment of Lessee's rights under the warranty in event of failure of title, it is agreed that if

Lessor owns an interest in said land less than the entire fee simple estate, then the royalties and rentals to be paid Lessor shall be reduced proportionately.

10. Lessee hereby by acceptance of this lease, agrees, binds and obligates himself to pay all costs and expenses in defending the title and to hold Lessors harmless and free of any costs and expense in this connection.

11. As a further consideration for this lease, Lessee, his successors and/or assigns, hereby assign, promise and agree to pay to Lessors, their heirs or assigns, from the proceeds of one-eighth (1/8th) of the seven-eighths (7/8ths) working interest, of each oil well made and completed on the above described land, the sum of twenty-five hundred ($2500.00) dollars, free of all operating costs and expenses, which shall be payable only if, as and when such oil well and/or wells have been made and such oil shall be produced, saved and marketed from said wells, and at the market price and or prices as may be obtained by Lessee for such oil from time to time and until this part of the consideration shall be paid, after which payment the said one-eighth working interest shall revert to and become the property of Lessee, his successors and/or assigns under the other terms and conditions of this lease.

251 In Witness Whereof, this instrument is executed on the date first above written.

F. E. ROGERS,
her
MRS. L. J. X Rogers,
mark
J. E. ROGERS,
ELVIE ROGERS WASKOM,
OLA MAE ROGERS,
W. H. ROGERS.

Witnesses:
JAS. L. LANTZ,
As to mark of Mrs. L. J. Rogers."

(Acknowledgments.)

Counsel for Defendants:
"We offer in evidence a boundary line agreement between B. F. Phillips and others, being EXHIBIT No. 44."

Counsel for Complainant:
"We object to the introduction of the exhibit for the reason that it is irrelevant and immaterial."

The Court:
"Objection overruled."

Counsel for Complainant:
"We except."

The Court:
"The exhibit is admitted and is as follows:

"Boundary Line Agreement,

"B. F. Phillips, et al., to Each Other.

Dated: Mch. 8, 1935.

Filed: Nov. 22, 1935.

Recorded in Vol. 192, page 150, Deed Records of Gregg County, Texas. File No. 12,091.

The State of Texas,
County of Gregg.

Whereas, B. F. Phillips, of Gladewater, Gregg County, Texas, is the assignee of a certain oil and gas lease executed by J. R. Bozeman and wife, to J. T.
252 Brewer, covering certain land in the G. A. Thomason Survey, Gregg County, Texas, said assignment being of record in Book 174, page 57, of the Deed Records of Gregg County, Texas; and

Whereas, said B. F. Phillips has secured certain quitclaim deeds covering the east half of the said Thomason Survey from the Moseley Heirs, as appear of record from some eighteen such quitclaim deeds; and,

Whereas, Z. M. Simmons, B. P. Dunlap and Swiss Oil Corporation, hold of record oil and gas leases covering land lying immediately east and adjacent to the land covered by the said Brewer lease, and since there may be some confusion with respect to the respective leases and on account of the said quitclaim deeds, the parties have agreed, and do now agree on a boundary line between them, the said B. F. Phillips and L. F. Burke agreeing that they do not claim, as against the other said named parties, Z. M. Simmons, B. P. Dunlap, Swiss Oil Corporation, H. O. Gossett, F. E. Rogers and wife, Rose Rogers, any mineral leasehold interest east of said line, and the said Z. M. Simmons, B. P. Dunlap, Swiss Oil Corporation, H. O. Gossett, F. E. Rogers and wife, Rose Rogers, agreeing that they, nor any of them, claim any mineral leasehold interest west of said line, said line being as follows:

Beginning at a point 66.89 feet west of the old gear wheel driven in ground for the N. W. corner of A. N. King tract, and N. E. corner of Z. M. Simmons, said gear wheel being 880 yards (2640 feet) west of the east line of the Thomason Survey;

Thence North to the Longview-Gladewater Highway, and continuing on North to North line of said G. A. Thomson survey.

Also starting at same point, 66.89 feet West of said old gear wheel;

Thence South to South line of said G. A. Thomason survey.

Phillips now has a well on the Brewer lease, West of this line, and Simmons one East thereof, and neither claims any interest in the well of the other.

This agreement shall run to and be binding upon the parties hereto, their heirs, successors and assigns, but shall not inure to the benefit of any other person or operate against any party hereto, except as between themselves, their heirs, successors and assigns.

Witness our hands this the 8th day of March, A. D. 1933.

B. F. PHILLIPS,
253 L. F. BURKE,
F. E. ROGERS,
MRS. ROSE ROGERS,
B. P. DUNLAP,
H. O. GOSSETT,
Z. M. SIMMONS,
By JAY SIMMONS,
Attorney in Fact.
SWISS OIL CORPORATION,
By JAY SIMMONS, President.

Attest:
O. J. DICKINSON, Secretary. (Corp. Seal)."

(Acknowledgments.)

J. E. ROGERS, a witness produced by defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Defendants:

"My name is J. E. Rogers and I am known as Dink Rogers and the son of J. F. Rogers. My mother's name is Pearlie Rogers and she is living.

I remember something about the partition when it was made in 1899. My first recollection of the matter occurred

in 1905. I had occasion to go to the Southwest corner of my mother's tract at that time with Seth Davis.

Q. What was at the corner there, marking it?

Counsel for Complainant:
"We make the same objection. It is immaterial and irrelevant, and not called for in the field notes."

254 The Court:
"Overruled."

Counsel for Complainant:
"We except."

(Direct Examination Resumed.)

By Counsel for Defendants:
"A pine knot or a stake was at the corner when I got there. An old gear wheel was placed at the same place where the pine knot or stake was. Seth Davis was with me when it was placed there.

Q. At that time, and since that time, and throughout your knowledge and recollection of that, tell at what point, you have understood the Southwest corner of your 68 acre tract to be, as partitioned in the partition?
A. The gear wheel."

Counsel for Complainant:
"We object to that as immaterial and irrelevant, and in contravention of that deed."

The Court:
"Overruled."

Counsel for Complainant:
"We except. And may we have the same general exception and objection?

The Court:

"Yes."

(Direct Examination Resumed.)

By Counsel for Defendants:

"I am the J. E. Rogers who signed the lease to Mr. Chandler. I saw the surveyor sometime thereafter out on the tract of land. I saw him when he had started the survey and before he completed it. He said he
255 was going to survey out the lease to the Empire Gas & Fuel Company. I could not say where he was when I first saw him. I thereafter went to the gear wheel with him. When we got there he asked me what the gear wheel represented and I told him it was the Southwest corner of our tract. I told him that that was the corner in the partition and that West of there is where the East line used to run. When I told him the gear wheel represented the corner in the partition he did not say anything about it.

At that time there was no iron stake at the Northeast corner of our tract. There had been an iron stake there up until about 1924, when I drug it down with a log wagon. I was working for Collie Magrill, driving a log team and the wagon had eight wheels. It was low and the pipe was sticking up high and I pulled it down with the log wagon the first trip I went over it. There has not been an iron stake there until the time the Empire drove that stake there.

Later on, Mr. Cox came to me with a ratification instrument. He told me that it included the same land the Chandler lease had. I found out that it included more land than the Chandler lease and, after I found it out I said something to Mr. Cox about it in front of the filling station that I was operating at that time.

Q. What did he say about it?

A. He said he was working for the company.

Q. He said he was working for the company, and you would have to blame them?

A. Yes.

256 Counsel for Complainant:

"We object to that as immaterial, and irrelevant, and incompetent, talking with an agent, and all the transaction was past."

The Court:

"I doubt the materiality of that. Go ahead."

(Direct Examination Resumed.)

By Counsel for Defendants:

"The Dunlap lease is signed by F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, J. E. Rogers and his wife, and Elvie Waskom and they are the only heirs of Alexander Rogers, my grandfather."

Cross Examination.

By Counsel for Complainant:

"My uncle is W. H. or Doc Rogers. F. E. Rogers is Flavius Rogers; J. W. Rogers was John Rogers and he is dead. My father died in 1899.

I am forty-one years old. I went out with Seth Davis to the gear wheel in 1905 and I was about nine years old and Seth was about twenty-five years older than I was. There were some marked trees down where we put the gear wheel, along about that line. I do not know where they stood. They have disappeared long ago. The fence from our most Northerly Southeast corner up to the North line has stood there since about 1920. I put it there and it has stood where I put it ever since then. I ran the fence through by guess. I did not know whether it was right. I knew it was somewhere in the neighborhood of right. I did not intend to put it on my line. I wanted to put it West of the line about five or six feet. I knew Akin was claiming East of our land. The fence, in a general way was the line between our land and the Akin land. Akin never fenced the land along there. I kept

the fences up. I do not know anything about
227 when Doc Rogers deeded the tract away and the
12 varas excess. I did not see it measured out. When he sold that land I was very small. There had never been a fence along there until I fenced it.

I do not know when the iron stake or bolt was put there that is in the road now with the pipe driven around it. It has been there a few years. I showed that to Ben Ramsey and Ben Leuty. I told them where it was standing but there was no pipe there when the engineers came by. I showed him where it should be. I did not show him an iron stake or bolt on that corner. I did not put a pipe around the bolt I showed him. I just walked out there about where it was. I knew about where the corner was or where it should have been. I went up North of where the fence was, maybe ten feet. The fence was running South of me, right South from where I showed him the corner.

I did not show him the Northwest corner over here by the Mings tract. There was no corner established. There was a witness tree there but I did not figure that for a corner. The oak was not the corner. It witnessed the corner but there was no corner there. The post oak was there and marked and it is there yet. I knew I could go back away from the post oak the proper direction and distance and set the corner. The fence was right where the old remains of it is now. There are just a few bushes grown up there. There might have been one or two wires there but I could not say whether they were on the line or anything like that. The fence was put there by Jim Mings and myself.

The surveyors I think ran East of the post oak. They ran down around the fence, along the fence. When they
got down to the Southeast corner I showed them
258 that corner. There was an old pipe driven there.
That pipe marked my corner and I showed them a tree out here on the edge of the road. The pipe was in the edge of the road.

Q. The Mings line. You have heard the field notes read?

A. I did not tell them anything about that, for there was no corner out there. I could not tell them where it was at."

Counsel for Defendants:

"We object, because the field notes call for the corner to be inside the fence."

(Cross Examination Resumed.)

By Counsel for Complainant:

"I knew there was a tree there. I do not know whether it was a bearing tree for the corner. I was not out there when the two acres were surveyed out. My old fence ran down along the East side of the road going South.

I remember when the land was sold to Wood in 1917. It is 1919.14 feet from the Southeast corner of the Mings tract out in the road as it is shown on Exhibit No. 16, down to the point West of the bevel gear.

I did not tell them that my corner was out 66 feet West of the bevel gear. I did not see them establish the corner there. I went with them on Sunday and the next morning I was not with them. They were out one afternoon and the next morning. I do not know whether they came back the next day or the next week. I found where they had put a pipe and marked some trees out West of the bevel gear. I went with them over to point E on Exhibit No. 14, at our line over there. There was no corner right there. There was a fence that ran
259 down through there and the fence also ran up Northeast to the highway. There was a fence North of the highway and a fence back over to the Southeast corner. That is now owned by King. That is East of our land. Mr. Akin is in the Northeast corner. Akin and King both own East of our land. I showed them where our corner at D was on Exhibit No. 14. There

was an old fence that I showed them that was not quite on the line as shown on Exhibit No. 16. I showed them the most Northerly Southeast corner. There is an old bolt driven there in a fence corner. The fence ran from point C on Exhibit No. 16, on up to point D, just as shown on the exhibit. The fence had been there a good long time. The old Rogers homestead set up around point D on Exhibit No. 14. It was North of the road but midway of our most Northerly and South lines.

I do not know Mr. Harrison, of the Shell Petroleum Company, and I did not point out to him the corner."

Re-Direct Examination.

By Counsel for Defendants:

"As soon as I found out they had marked the trees on the West part over there next to the Haynes line, my sister and I took the matter up with Judge Gossett and he had the survey made and the pictures taken."

Counsel for Defendants:

"Defendants rest."

Counsel for Complainant:

"We want to recall F. E. Rogers."

F. E. ROGERS, being recalled, testified as follows:

260 Direct Examination.

By Counsel for Complainant:

"My name is F. E. Rogers and I testified yesterday that I went around as one of the parties with Mr. Simmons when he made the survey. When he went West from the Southeast corner on the East line of the Thomason survey 880 yards where I said he set the stake and the bevel gear is now driven, he did not mark any trees. There

were just little saplings there; he put down a stake and did not mark any trees.

R. M. WOOD, a witness produced by complainant, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Complainant:

"My name is R. M. Wood and I am sometimes called Bob Wood. I live at Gladewater and have lived there for fifty-two years. I am in the real estate business. I have been engaged in the real estate business since 1912. My wife's mother was a Victory. I know J. W. Mings and I know the Rogers and G. W. Clark. I knew Wiley Davis. I first heard of this case at nine o'clock this morning. Mr. Harry Cowing came to my office. He is counsel for the Empire Company. I had not heard of him before then. He wanted to know if I had owned a certain two acre tract of land down there and I told him I had. I know where the Haynes land is. I sold Haynes that land. I did not know B. M. Bozeman but I knew all of his boys and girls. I know where the G. W. Clark or Wiley Davis land is. There is a road running North from the highway between the Davis land and the Rogers land. I know both tracts. I have had something to do with both
261 tracts.

In 1917 I bought twenty-five acres of land from J. W. Mings out of the Northwest corner of the Northwest one-fourth less a two acre tract. I sold the Clark tract for J. R. Mings about 1915. I sold it to J. W. Clark. I once owned the two acres up in the Northwest corner of the J. F. Rogers land. I owned it I think in 1917. The two acres were fenced at that time. I was on the land. I was on the land to the East and West of the fence. The Clark or Davis land West was fenced except an acre out of the Northwest corner of the Clark tract which was known as the school house acre. The fence ran up to

that school house lot and then ran around it. I would say that the West fence of the Mings tract which I bought was about thirty or thirty-five feet East of the fence on the Clark tract across the road. The fence ran approximately North and South. The Davis or Clark fence was approximately North and South. The fence ran from my Southwest corner down South a little bit East. The fence ran along there. The fence on the East side of the road was right up on the side of the ditch. The road I think was about thirty-five feet wide.

I knew J. A. Simmons. He was County Surveyor. I first knew him in 1898. When I bought the two acres from J. W. Mings I got some old papers from Mings. Some of the papers were field notes of those tracts up there.

The Court:
"Was old man Simmons a pretty careful surveyor?"

"A. I could not say that he was. May I tell you something else, as to why I say that? He did a lot of surveying for my father in the old days; and I checked in behind him; and I would not call him an expert surveyor."

262 The Court:
"Did you get him to survey this piece?
"A. No, he was dead then."

(Direct Examination Resumed.)

By Counsel for Complainant:
"The three papers, Exhibits Nos. 45, 46 and 47, are the ones I took from Mr. Mings with the title papers. Exhibits Nos. 45 and 46 are in Mr. Simmons handwriting. I am pretty sure that No. 47 is also in his handwriting."

Counsel for Complainant:
"We offer Exhibits Nos. 45, 46 and 47 in evidence."

P. O. Call field notes- R. H. Rogers place.

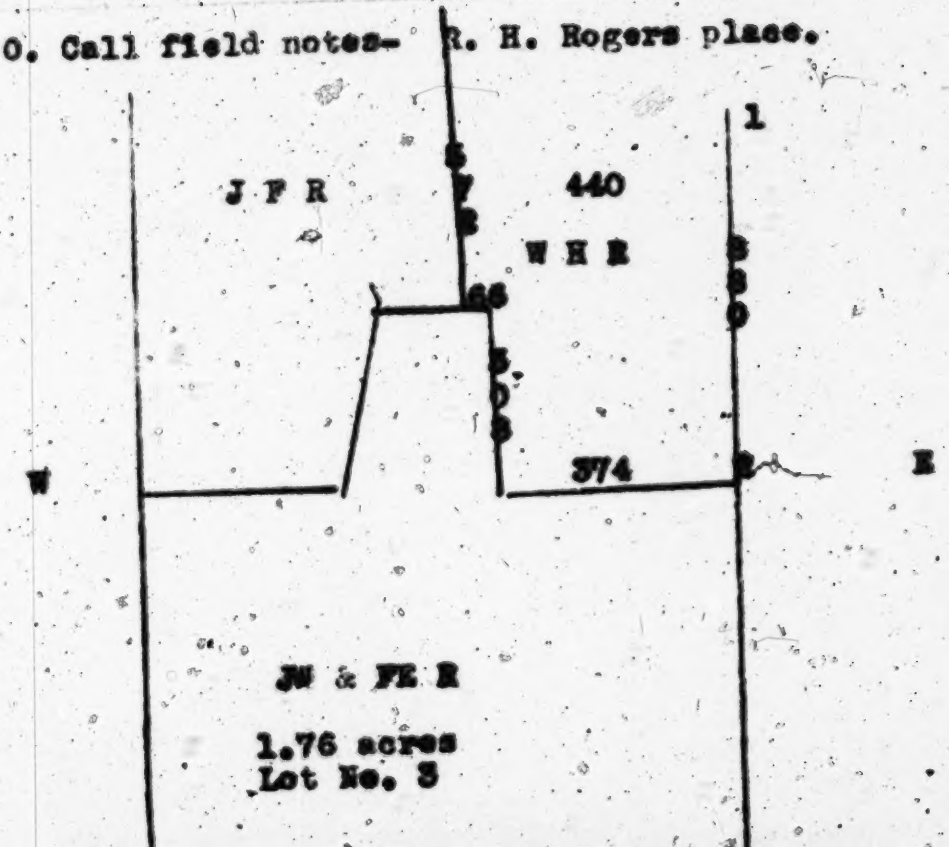
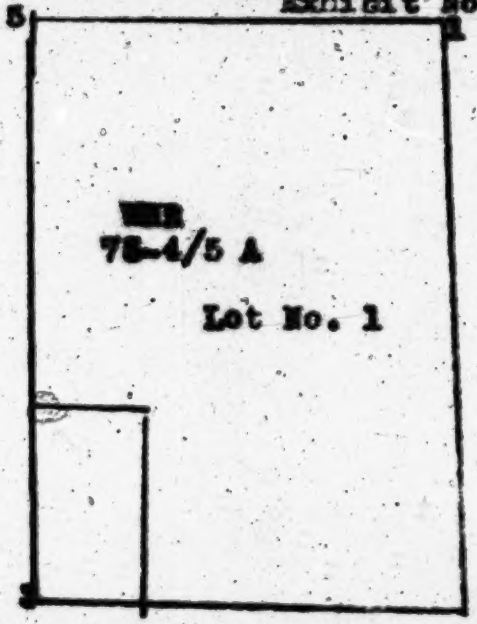


Exhibit No. 46.



Process verble of survey made the 23rd day of Feby.1899 for the Rogers Bro., starting at the NE corner of tract which is corner 1 as shown on plat above; running South 880 yards to corner 2 witness tree red oak S 69° E 10 links and pine N

154-

The Court:

"The exhibits are admitted and are as follows:

EXHIBIT No. 45.

"Process verble of Survey made the 23rd day of Feby., 1899, for Rogers Bro.

Starting at corner No. 2 which is the SEC of WHR tract witness trees red oake S. 69° E. 10 links and pine N. 43° W. 14 L. with cross on each tree;

Thence West 374 yards no witness trees given;

Thence North 308 yards, red oake S. 45° E. 4 L.;

Thence West 66 yards to JFR line pine S. 2° W, 27 L.;

Thence West 154 yards no witness trees given;

Thence South with about 12° West about 310 yards; no witness trees given;

Thence West 224 yards to corner 4—witness trees, pine S. 65° W. 6 L. and pines 80° E. 14 L.;

Thence South 880 yards to SWC of tract;

Thence East 880 yards to SEC of tract;

Thence North 880 yards to NEC of tract, the starting point—containing 176 acres for J W and F E R Lot No. 3, plated red.

I hereby certify the above is true and correct survey according to deeds.

This Feby. 24th, 1899.

J. H. SIMMONS, Surveyor.

264 43° W. 14 L. with cross on each tree; thence West 440 yards to corner 3 pine stump S. 7° E. 10 L. which is center of Rogers Tract; thence West 440 yards to corner 4 to Bozeman land pine S. 65° W. 6 L. and pine S. 80° E. 14 L. then come back to corner 3, center of tract and run North 880 yards to corner 5; pine N. 40° E. 5½ L. and pine S. 32° W. 11 L.; thence East 440 yards to starting point, containing 80 acres, which is Lot No. 1, less 4-1/5 acres off for J. W. and F. E. Rogers plated red.

I hereby certify the above is true and correct survey, according to deeds.

This Feby. 24th, 1899.

J. H. SIMMONS, Surveyor.

EXHIBIT No. 47.

State of Texas,
County of Gregg.
Know All Men by these Presents:

That I, J. F. Rogers, J. W. Rogers and F. E. Rogers, of the State and County aforesaid, for and in consideration of fifty dollars in hand, the receipt whereof is hereby acknowledged, do this day bargain, sell and convey, all interest in the following described tract or parcel of land, unto W. H. Rogers, of the same State and County, to-wit:

Starting at the NE. corner of the Rogers tract running South 880 yards; thence West 374 yards; thence North 308 yards; thence West 66 yards; thence North 572 yards; thence East 440 yards to starting point, containing 75-4/5 acres, more or less, with all the improvements thereon in the G. A. Thomason's Headright certificate, the title to said land I warrant and defend unto said W. H. Rogers, his heirs, assigns forever, binding myself, my heirs & assigns and legal representatives to the same in testimony whereof we hereunto sign our names in the presents of

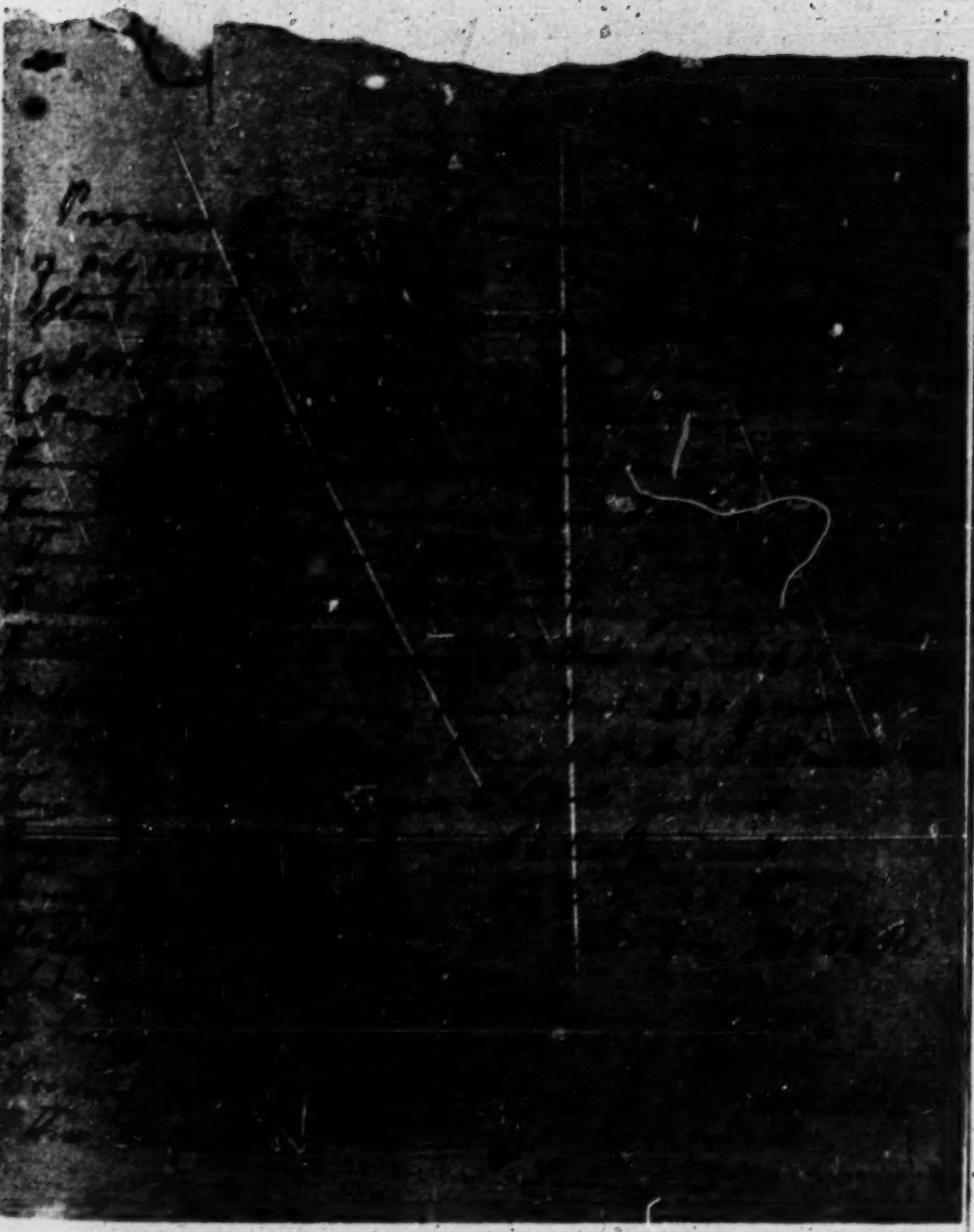
the attesting witnesses as Notary Public, on this the 28th day of Feby., A. D. 1899.

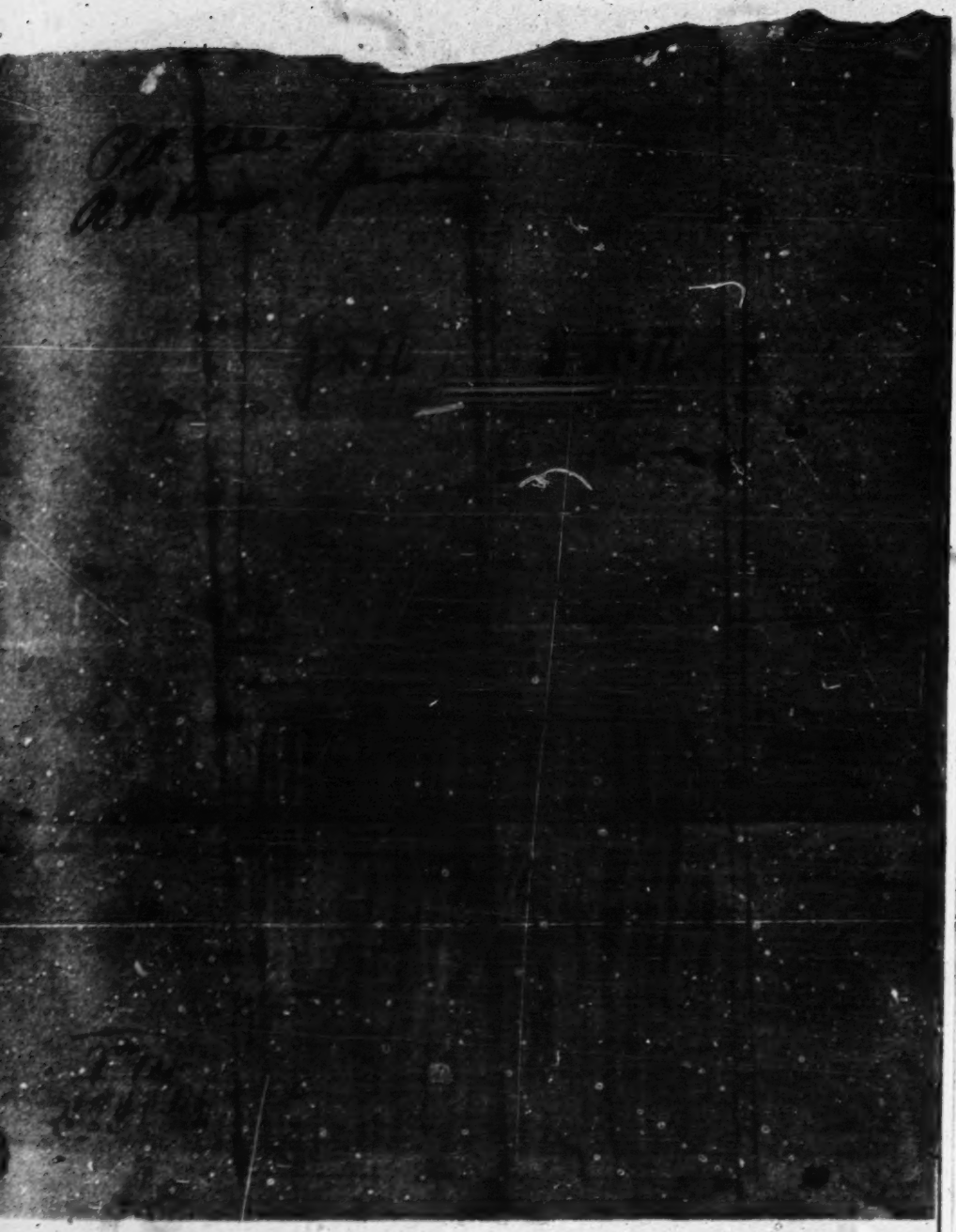
J. F. ROGERS,
F. E. ROGERS,
J. W. ROGERS.

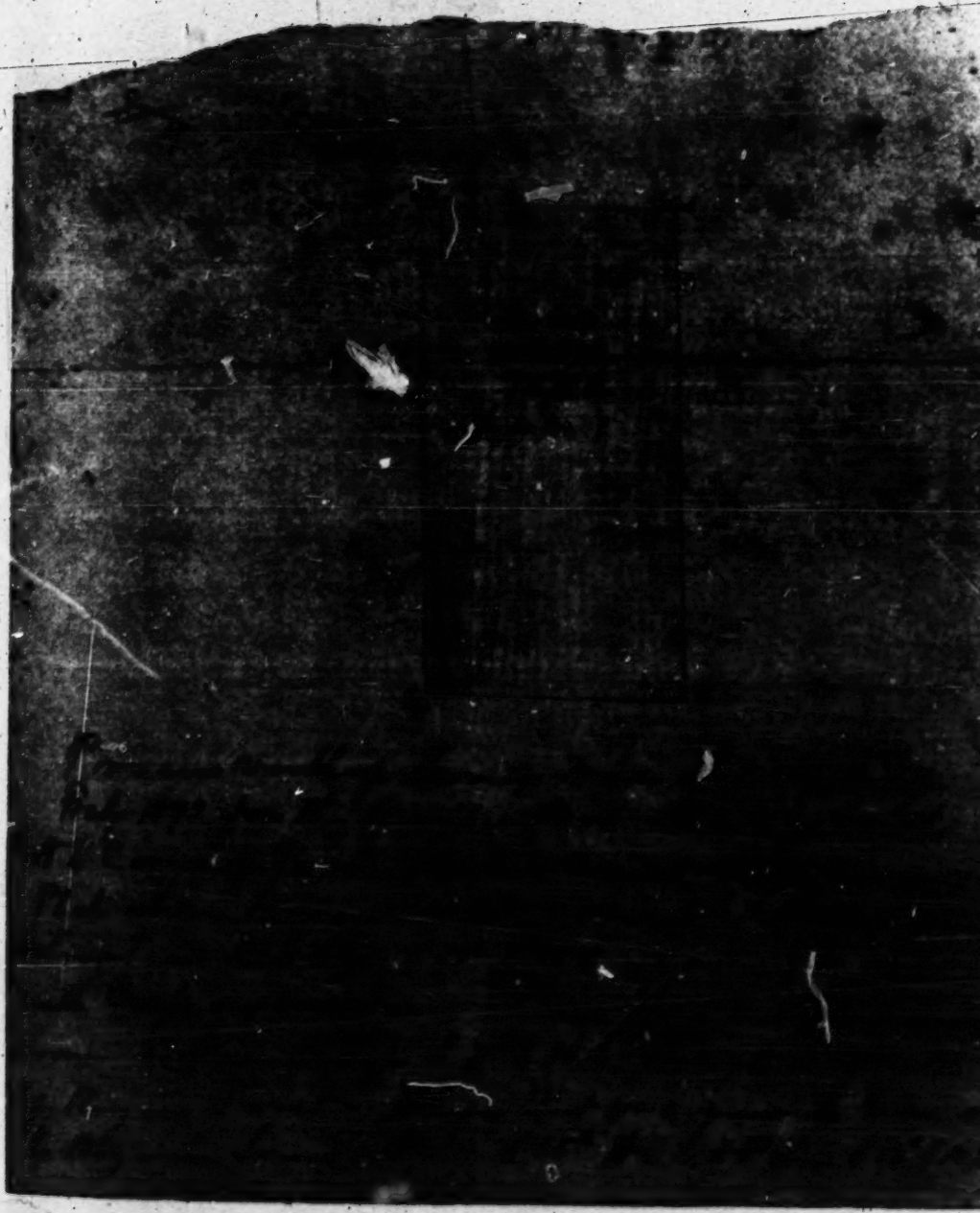
(Acknowledgment.)

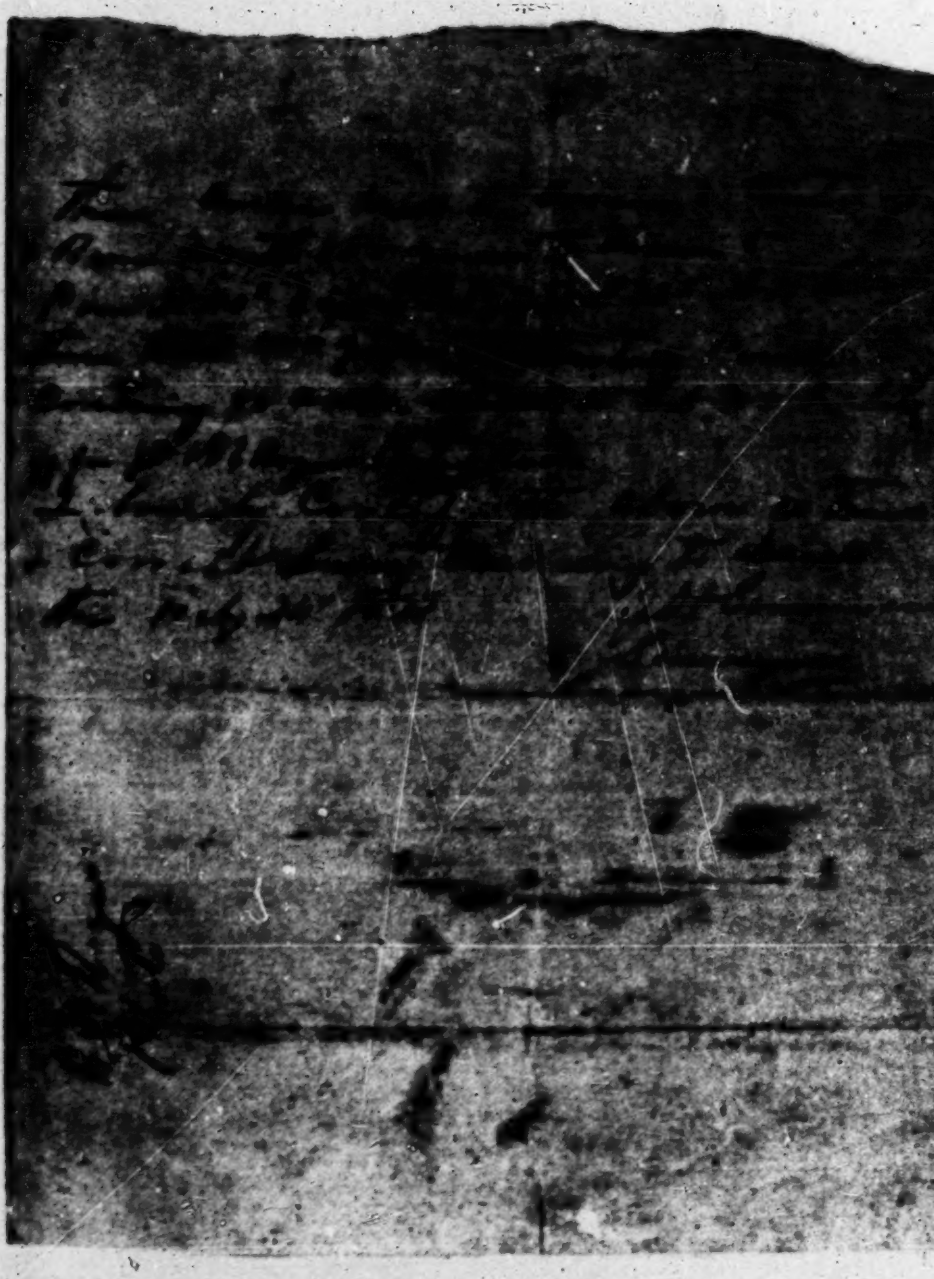
Filed for record July 10, 1915, at 10 o'clock a. m. Dush Shaw, Co. Clk., Gregg Co. Recorded in Book 29 on pages 559 & 60 at 9:30 o'clock a. m., August 5th, 1915."

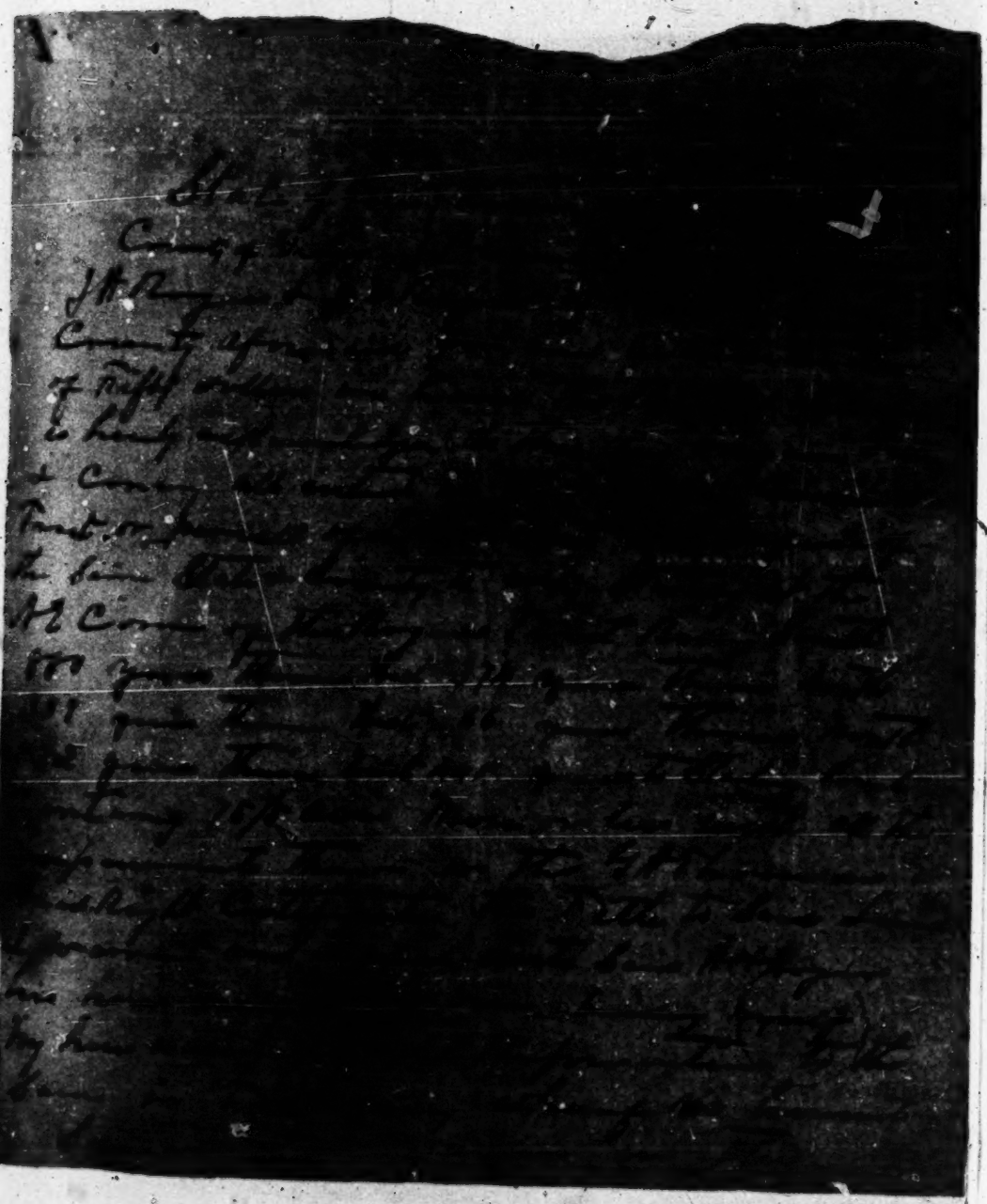
265 Upon request of Complainant that photostatic copies of Exhibits Nos. 45, 46 and 47 likewise accompany the record for the inspection of the Court, such request is granted and photostatic copies of these exhibits are as follows:

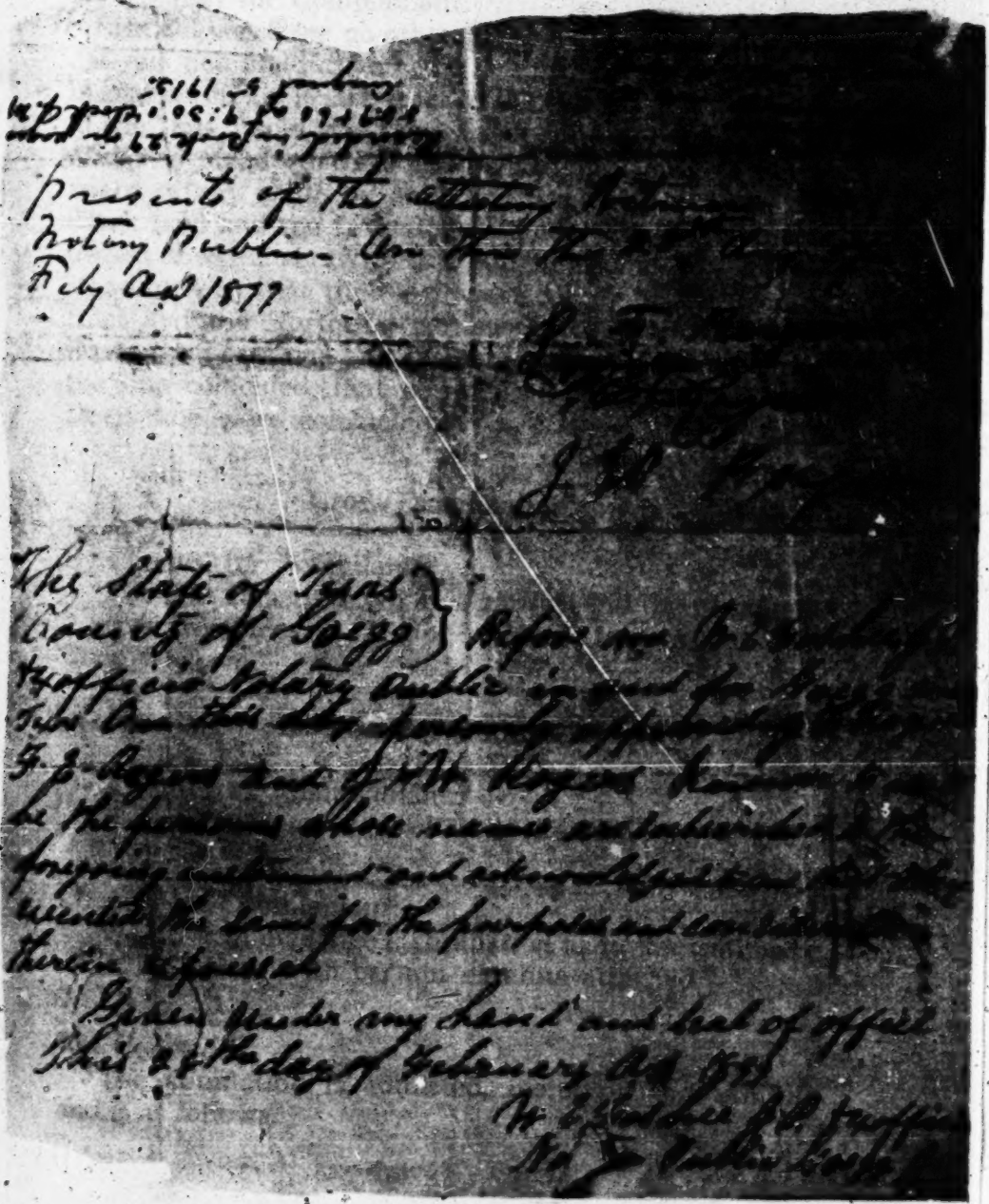












Present of the attesting
Notary Public on this the
Feby A.D. 1877

The State of Texas }
County of Gonzales } Before me [illegible]
[illegible] Notary Public in and for Gonzales
Texas On this day personally appeared [illegible]
[illegible] Regan and [illegible] known to
me to be the persons whose names are subscribed to the
foregoing instrument and acknowledged to me that they
executed the same for the purposes and consideration
therein expressed

Given under my hand and seal of office
This 24th day of February A.D. 1877

[illegible] Lee [illegible]
[illegible] Gonzales County

272 (Direct Examination Resumed.)

By Counsel for Complainant:

"He delivered me no other papers.

I did not measure off the 2 acre tract up there. I measured off the Clark tract to the West of it. That was at the time I sold the 2 acre tract for the heirs of J. R. Mings to Mr. Jordan. Jordan sold it to Clark. I never heard of any claim by anybody to a strip between the Clark land and the L. J. Rogers land. The Rogers heirs owned these 2 acres until I bought them. My understanding was that the Northwest corner of the 2 acres tract and the Northeast corner of the Clark or Wiley Davis tract was one and the same corner. I understood the line coincided, that is, my line and the Clark and Davis line were coincident."

Cross Examination.

By Counsel for Defendants:

"I bought 25 acres from J. W. Mings and then I bought 2 acres from Mrs. L. J. Rogers, J. E. Rogers and Mrs. Elvie Waskom."

Re-Direct Examination.

By Counsel for Complainant:

"I owned the 2 acres just East of the G. W. Clark land."

Counsel for Complainant:

"We offer in evidence a stipulation as to the testimony of R. M. Wood, with certain exhibits attached."

The Court:

"The stipulation is admitted, including the exhibits and is as follows:

273 "In the District Court of the United States, for the Eastern District of Texas, Tyler Division.

Empire Gas & Fuel Company
vs. No. 803 In Equity.
B. P. Dunlap, et al.

It is stipulated that the witness, R. M. Wood testified that he was the grantee in plaintiff's exhibit No. A, being a deed dated May 8, 1917, (erroneously dated 1918), and at the time he purchased the second tract, being two (2) acres, more or less, the grantor, J. W. Mings, was in possession thereof under fences, except possibly in front of the house and between the road and the yard fence there was an open space of a few feet. The west fence of the tract above the yard fence enclosed an orchard and was on the east edge of the road and about thirty-five (35) feet from the east fence on the tract formerly belonging to Wiley Davis and now owned by G. W. Clark. The north fence was on the south side of a lane and cornered on the east near the post oak tree referred to in the description. The fence then ran southerly and connected with the yard fence which surrounded the residence on the south part of the tract. The witness and Mings measured off the land.

The witness further testifies that he was the grantor, along with his wife, in plaintiff's Exhibit No. B, being a deed to Mrs. Eva Patterson, dated September 5, 1917, covering as the second tract said two (2) acres, more or less mentioned above, and that at the time of the sale to Mrs. Patterson he was in possession under the same fences.

The witness further testifies that he handled the sales from Mrs. Eva Patterson to Mrs. J. H. Wilkins, evidenced by plaintiff's Exhibit No. C, which is dated April 17, 1918, and from Mrs. J. H. Wilkins to J. G. Pegues, which is evi-

denced by plaintiff's Exhibit No. D, dated January 23, 1922. The witness took Mrs. Wilkins out and showed her the corners and fences, which were the same as testified to above.

In each of the sales above mentioned the first tract was approximately 23½ acres out of the northeast corner of the G. A. Thomason Survey and was supposed to be the north twenty-five (25) acres of the W. H. Rogers original tract except two (2) acres off the west side thereof which the witness also owned at one time, as is shown by the evidence.

It is further stipulated that the attached deeds are in evidence as plaintiff's Exhibits Nos. A, B, C, D, E and F.

(Signatures)

274 EXHIBIT No. A.

"Deed.

"J. W. Mings et ux to R. M. Wood.

Dated: May 8, 1918.

Filed: May 10, 1917, 1:00 P. M.

Recorded: Vol. 32, page 565, Deed Records, Gregg Co., Texas.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That we, J. W. Mings and wife, Addie Mings, of the county of Harrison, State of Texas, for and in consideration of the sum of five

hundred ($500.00) dollars to us paid, and secured to be paid by R. M. Wood as follows:

Two hundred ($200.00) Dollars to us cash in hand paid the receipt of which is hereby acknowledged and the execution and delivery of two certain promissory notes of even date herewith, each in the sum of $150.00 and due on or before January 1st, 1918, and January 1st, 1919, respectively. Said notes to bear interest at the rate of 8% per annum, the interest payable annually as it accrues, at Gladewater, Texas, and payable to J. W. Mings or order. Have Granted, Sold and Conveyed, and by these presents do grant, sell and convey, unto the said R. M. Wood of the County of Gregg, State of Texas, all that certain tracts or parcels of land situated in Gregg County, Texas, about two and one-half miles East of Gladewater and being a part of the G. A. Thomason H. R. Survey and described by metes and bounds as follows, to-wit:

First Tract: Beginning at the NE corner of said G. A. Thomason survey an iron stake for corner;

Thence West 444.5 vrs. with NB line of said G. A. Thomason survey to corner, witness P. O. tree 24 inches in diameter brs. N. about 30 deg. W. 27 feet;

Thence S. 298 vrs. to the W. H. Conn 50 acre tract to corner, said corner being 118 feet and 3 inches E. of the N. W. corner of said W. H. Conn 50 acre tract;

Thence East 444.5 vrs. to the W. B. line of W. G. Painter Survey an iron stake for corner;

Thence North with WB line of said G. A. Thomason Survey 298 vrs. to the place of beginning, containing 23½ acres of land, more or less.

This being the same land conveyed by E. L. Walker, M. D., and Nannie E. Walker to the grantor herein by

deed dated Nov. 25th, 1910, recorded in Vol. "X," on pages 278 and 279, Gregg County, Texas.

Second Tract: Being a part of the G. A. Thomason Survey in Gregg County, Texas, about two and one-half miles East of Gladewater, and described by metes and bounds as follows, to-wit:

Beginning at the N. W. corner of J. F. Rogers estate 68 acre tract of land, said beginning corner being about 953 vrs. West of the N. E. corner of G. A. Thomason H. R. Survey.

275 Thence East 147 feet to corner on the N. B. line of said G. A. Thomason H. R. Survey witness P. O. tree about 12 inches in diameter brs. W. 5 feet;

Thence South with fence 757 feet to corner said corner being 21 feet SE of the SE corner of residence;

Thence West 115 feet to the Union Grove Public Road; same being the E. B. line of a 26 acre tract conveyed by Victory to Davis. Vol. "R," page 406, witness B. J. tree about 16 inches in diam. brs. N. about 10 deg. E. 75 feet;

Thence North with meanderings of said road to the place of beginning containing about two acres of land, more or less. This being the same land conveyed to the grantors herein by Mrs. L. J. Rogers, Elvie Waskom and J. E. Rogers by deed dated May 7th, 1917.

To have and to hold the above described premises, together with all and singular the right and appurtenances thereto in anywise belonging unto the said R. M. Wood, his heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors and administrators, to warrant and forever defend all and singular the said premises unto the said R. M. Wood, his heirs and

assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

But it is expressly agreed and stipulated that the vendor's lien is retained against the above described property, premises and improvements, until the above described notes and all interest thereon are fully paid according to their face and tenor, effect and reading, when this deed shall become absolute.

Witness our hands at Marshall, Texas, this 8 day of May, A. D. 1918.

J. W. MINGS,
ADDIE MINGS."

(Acknowledgment.)

(Certificates of County Clerk and Abstract Company.)

EXHIBIT No. B.

"Deed.

"R. M. Wood et ux to Mrs. Eva Patterson.

Dated: Sept. 5, 1917.

Filed: March 2, 1918, 3:00.

Recorded: Vol. 35, page 111, Deed Records, Gregg Co., Texas.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That we, R. M. Wood and wife, Bettie Wood, of the County of Gregg, State of Texas, for and in consideration of the sum of

eight hundred ($800.00) dollars to us paid, and secured to be paid, by Mrs. Eva Patterson as follows:

276 Four Hundred ($400.00) Dollars to us cash in hand paid the receipt of which is hereby acknowledged and confessed, and the further payment of four certain promissory notes as follows:

Note No. 1 for $100.00 due Oct. 1st, 1918;

Note No. 2 for $100.00 due Oct. 1st, 1919;

Note No. 3 for $100.00 due Oct. 1st, 1920; and

Note No. 4 for $100.00 due Oct. 1st, 1921,

all of the above notes dated Sept. 5th, 1917, and bear interest from the date at *at* the rate of 8% per cent. per annum, the interest payable annually as it accrues, both principal and interest being payable to R. M. Wood or order at Gladewater, Texas, have granted, sold and conveyed and by these presents do grant, sell and convey unto the said ..... of the County of Smith, State of Texas, all that certain tracts or parcels of land described as follows, to-wit:

First Tract: A part of the G. A. Thomason Survey in Gregg County, Texas, same being located about 2½ miles East from the town of Gladewater, and described by metes and bounds as follows:

Beginning at the N. E. corner of said G. A. Thomason Survey;

Thence West 487 vrs. to the N. E. Corner of J. F. Rogers 68 acre tract;

Thence South with J. F. Rogers tract 298 vrs.;

Thence East 487 vrs. to E. B. line of G. A. Thomason Survey;

Thence North 298 vrs. to the place of beginning, containing 25.68 acres of land.

Second Tract: A part of the same survey:

Beginning at the N. W. corner of J. F. Rogers estate 68 acre tract of land, said beginning corner being 953 vrs. West of the N. E. corner of said G. A. Thomason Survey.

Thence East 144 feet to corner on N. B. line of G. A. Thomason Survey witness P. O. 12" in dia. brs. W. 5 feet;

Thence South with fence to corner, said corner being 21 feet SE of the SE corner of residence;

Thence West 115 feet to W. B. line of said J. F. Rogers 68 acre tract;

Thence North with W. B. line of said J. F. Rogers 68 acre tract to the place of beginning, containing 2.32 acres of land.

The first described tract being the same land conveyed by W. H. Rogers, et ux, Lizzie Rogers, and W. A. Wright to Mrs. E. L. Walker by deed dated Nov. 23, 1910, recorded in Vol. "X" on page 278 Deed Records of Gregg County, Texas.

The second tract herein described is the same land conveyed to Mrs. L. J. Rogers, J. E. Rogers, Elvie Waskom et vir Azzie Waskom to J. W. Mings, by deed dated May 7, 1917, recorded in Vol. "32" on page 563 deed records of Gregg County, Texas.

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To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said Mrs. Eva Patterson, a feme sole, her heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors and administrators, to warrant and forever defend all and singular the said premises unto the said Mrs. Eva Patterson, her heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

But it is expressly agreed and stipulated that the vendor's lien is retained against the above described property, premises and improvements, until the above described notes and all interest thereon are fully paid according to their face and tenor, effect and reading, when this deed shall become absolute.

Witness our hands at Gladewater, Texas, this 5th day of Sept., A. D. 1917.

R. M. WOOD,
BETTIE WOOD."

(Acknowledgment.)

EXHIBIT No. C.

"Deed.

"Mrs. Eva Patterson to Mrs. J. H. Wilkins.

Dated: April 17, 1918.

Filed: May 7, 1919, 9 A. M.

Recorded: Vol. 37, page 473, Deed Records, Gregg County, Texas.

Deed.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, Mrs Eva Patterson (a feme sole) of the County of Gregg, State of Texas, for and in consideration of the sum of One Thousand ($1000.00) and no/100 Dollars to me paid, and secured to be paid by Mrs. J. H. Wilkins, (a feme sole), the receipt of which is hereby acknowledged as follows:

Five hundred ($500.00) Dollars cash paid by the said Mrs. J. H. Wilkins from her separate estate, and two certain promissory notes of even date herewith executed by the said Mrs. J. H. Wilkins in the sum of One Hundred ($100.00) Dollars each payable to Mrs. Eva Patterson on or before the 1st day of October, 1922 and 1923, respectively; said notes bearing interest from date at
278 the rate of eight per cent per annum and payable in the town of Gladewater, Texas.

And the further consideration that the said Mrs. J. H. Wilkins assume payment of three certain promissory notes bearing date September 5th, 1917, executed by Mrs. Eva Patterson in the sum of $100.00 each payable to R. M. Wood or order, due October 1st, 1919, 1920 and 1921, respectively, said last named three notes being fully described in a deed from R. M. Wood and wife, Bettie Wood, to Mrs. Eva Patterson dated September 5th, 1917, and of record in Vol. 35, on pages 111, Deed Records of Gregg County, Texas.

Note No. One as described in said deed from R. M. Wood and wife has this day been paid and all interest on the three notes above assumed is paid to date.

Have granted, sold and conveyed and by these presents do grant, sell and convey, unto the said Mrs. J. H. Wilkins,

her separate estate of the County of Gregg, State of Texas all that certain tracts or parcels of land in the County of Gregg and State of Texas, being a part of the G. A. Thomason Headright Survey and described in two tracts as follows:

First Tract: Located about two and one half miles east from the town of Gladewater,

Beginning at the northeast corner of original headright survey;

Thence west 487 vrs. to the northeast corner of a 68 acre tract of land known as J. F. Rogers tract;

Thence South with said Rogers tract 296 vrs.;

Thence East 487 vrs. to the east boundary line of said original headright survey;

Thence North 298 vrs. to place of beginning, containing 25.68 acres of land.

Second Tract: Beginning at the northwest corner of J. F. Rogers 68 acre tract, said beginning corner being 953 vrs. west from the northeast corner of original survey;

Thence East 144 feet to corner on the north boundary line of said original survey, a post oak brs. W. 5 feet;

Thence South with fence to corner, said corner being 21 feet southeast of the southeast corner of residence;

Thence West 115 feet to west boundary line of said J. F. Rogers 68 acre tract;

Thence North with said Rogers tract of 69 acres to the place of beginning, containing 2.32 acres of land, both

tracts herein conveyed and containing 28 acres of land, more or less;

The said 28 acres of land herein conveyed is my separate estate, same being purchased from R. M. Wood and his wife, cash payments for same was made from insurance money left me by my deceased husband.

To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said Mrs. J. H. Wilkins, heirs and assigns forever; and
279 I do hereby bind myself, heirs, executors and administrators, to warrant and forever defend, all and singular the said premises unto the said Mrs. J. H. Wilkins, her heirs and assigns, against every person, whomsoever lawfully claiming, or to claim the same, or any part thereof.

But it is expressly agreed and stipulated that the vendor's lien is retained against the above described property, premises and improvements, until the above described notes and all interest thereon are fully paid according to their face and tenor, effect and reading, when this deed shall become absolute.

Witness my hand at Gladewater, Texas, this 17th day of August, A. D. 1918.

MRS. EVA PATTERSON.

$1.00 revenue stamp affixed and canceled."

(Acknowledgment.)

EXHIBIT No. D.

"Deed.

"Mrs. J. H. Wilkins to J. G. Pegues.

Dated: Jan. 3, 1922.

Filed: Jan. 17, 1922, 10:00.

Recorded: Vol. 44, page 31, Deed Records, Gregg County, Texas.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, Mrs. J. H. Wilkins, a feme sole, of the County of Gregg, State of Texas, for and in consideration of the sum of eight hundred dollars to me paid by J. G. Pegues as follows: Five hundred dollars cash in hand paid, the receipt of which is hereby acknowledged, and the assumption by the said J. G. Pegues of the payment of the principal of notes 3 and 4 due 10/120 and 10/1/21 respectively, given to R. M. Wood by Mrs. Eva Patterson, dated 9/5/17, as shown in deed of said R. M. Wood to said Mrs. Eva Patterson, said notes being for $100.00 each, recorded in Vol. 35, page 111, Deed Records of Gregg County, Texas; also, the assumption by the said J. G. Pegues of the payment of the principal of note No. 2, due on or before 10/1/23, given by Mrs. J. H. Wilkins to Mrs. Eva Patterson, being for $100.00 and dated 4/17/18; it being expressly understood that said J. G. Pegues obligates himself to pay the principal of said notes, together with all interest accruing thereon from this date, and
280 to hold the said Mrs. J. H. Wilkins free from all liability on account thereof; have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said J. G. Pegues, of the County of Gregg,

State of Texas, all that certain tracts or parcels of land, in the County of Gregg, State of Texas, being a part of the G. A. Thomason H. R. Survey, and described in two tracts as follows:

First Tract: Located about 2½ miles east from the town of Gladewater, beginning at the N. E. corner of original headright survey;

Thence W. 487 vrs. to the N. E. corner of a 68 acre tract of land, known as J. F. Rogers tract;

Thence South with said Rogers tract 298 vrs.;

Thence East 487 vrs. to the east boundary line of said original headright survey;

Thence N. 298 vrs. to the place of beginning, containing 25.68 acres of land.

Second Tract: Beginning at the N. W. corner of J. F. Rogers 68 acre tract, said beginning corner being 953 vrs. west from the N. E. corner of original survey;

Thence E. 144 feet to corner on the NBL of said original survey a post oak brs. W. 5 feet;

Thence S. with fence to corner, said corner being 21 feet SE of the SE corner of residence;

Thence W. 115 feet to WBL of said J. F. Rogers 68 acre tract;

Thence N. with said Rogers tract of 68 acres to place of beginning, containing 2.32 acres of land. Both tracts herein conveyed containing 28 acres of land more or less. The said 28 acres of land herein conveyed is my separate estate, same being purchased by me from R. M. Wood

and his wife, cash payments for same were made from insurance money left me by my deceased husband.

To have and to hold the above described premises, together with all and singular the right and appurtenances thereto in anywise belonging unto the said J. G. Pegues, his heirs and assigns forever; and I do hereby bind myself, my heirs executors and administrators to warrant and forever defend all and singular the said premises unto the said J. G. Pegues, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

But it is expressly agreed and stipulated that the vendor's lien is retained against the above described property, premises and improvements, until the above described note and all interest thereon are fully paid according to face and tenor, effect and reading, when this deed shall become absolute.

Witness my hand at Longview, Texas, this 3rd day of January, A. D. 1922.

MRS. J. H. WILKINS.

$.50 revenue attached."

(Acknowledgment.)

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EXHIBIT No. E.

"Deed.

"J. G. Pegues to J. W. Akin.

Dated Nov. 10, 1927.

Filed November 12, 1927, 1: P. M.

Recorded: Vol. 55, Page 57, Deed Records Gregg County, Texas.

Deed.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, J. G. Pegues, of the County of Gregg, State of Texas, for and in consideration of the sum of five thousand five hundred fifty and no/100 dollars to me in hand paid by J. W. Akin, as follows:

$250.00 cash in hand paid, the receipt whereof is hereby acknowledged, and the said J. W. Akin and wife this day conveying to me lots No. 1 & 8, in Block No. 2, of the Lacy-Bass Addition to the City of Longview, now being Lots No. 1 & 8 in New City Block No. 204, of the said City of Longview, in Gregg County, Texas.

Have granted, sold and conveyed and by these presents do grant, sell and convey unto the said J. W. Akin of the County of Gregg, State of Texas, all that certain lots, tracts or parcels of land situated about 10 miles west of Longview, in Gregg County, Texas, as follows:

First and Second Tracts: Being 42.6 acres and 95.5 acres of land, fully described as tracts Nos. 1 and 2, in a deed from W. H. Evans et ux to J. G. Pegues, dated Oct. 28, 1918, and duly recorded in Gregg County Deed Records, Book 38, page 198, to which record reference is here made for a more particular description.

Third Tract: Being 28 acres adjoining the above, in Gregg County, Texas, fully described in a deed from Mrs. J. H. Wilkins to J. G. Pegues, dated Jan. 3rd, 1922, and duly recorded in Vol. 41, page 31-3 Gregg County Deed Records. The three above described tracts of land contain in all 166 acres of land, more or less, and are located on the Wm. G. Painter and G. A. Thomason surveys, in Gregg County, Texas.

To have and to hold the above described premises together with all and singular the rights and appurtenances thereto in anywise belonging unto the said J. W. Akin, his heirs and assigns, forever; and I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend, all and singular the said premises unto the said J. W. Akin, his heirs and assigns, against every person whomsoever lawfully claiming or
282 to claim the same, or any part thereof.

Witness my hand at Longview, Texas, this 10th day of Nov., A. D. 1927.

J. G. PEGUES."

(Acknowledgment.)

EXHIBIT No. F.

"Deed.

"J. W. Akin to Geo. Clark.

Dated: Jan. 3, 1930.

Filed: Jan. 15, 1930.

Recorded: Vol. 58, page 542, Deed Records, Gregg Co., Texas.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, J. W. Akin, of the County of Gregg, State of Texas, for and in consideration of the sum of Two Hundred Fifty and no/100 Dollars to me paid and secured to be paid by Geo. W. Clark as follows: $50.00 cash in hand paid, the receipt whereof is hereby acknowledged, and his two notes of even date herewith for $100.00 each, due Nov. 1, 1930 and

1931, each respectively, bearing 10% interest per annum from date and in certain contingencies providing for attorneys' fees, have granted, sold and conveyed and by these presents do grant, sell and convey unto the said Geo. W. Clark, of the county of Gregg, State of Texas, all that certain lot, tract or parcel of land, situated in Gregg County, Texas, and being a part of the G. A. Thomason H. R. Survey and

Beginning at the N. W. corner of Rogers 68 acre tract;

Thence E. 144 feet to corner;

Thence S. with fence to corner;

Thence W. 115 feet to W. B. L. of 68 acre tract;

Thence N. with 68 acre tract to beginning, containing 2.32 acres of land, more or less, fully described in deed from Mrs. J. H. Wilkins to J. G. Pegues, recorded in Vol. 44, pages 31-33, Gregg County, Deed Records, to which reference is here made.

To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said Geo. W. Clark, his heirs and assigns forever; and I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said Geo. W. Clark, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

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But it is expressly agreed and stipulated that the vendor's lien is retained against the above described property, premises and improvements, until the above described note and all interest thereon are fully paid

according to face and tenor, effect and reading, when this deed shall become absolute.

Witness my hand at Longview, this 3rd day of Jan., A. D. 1930.

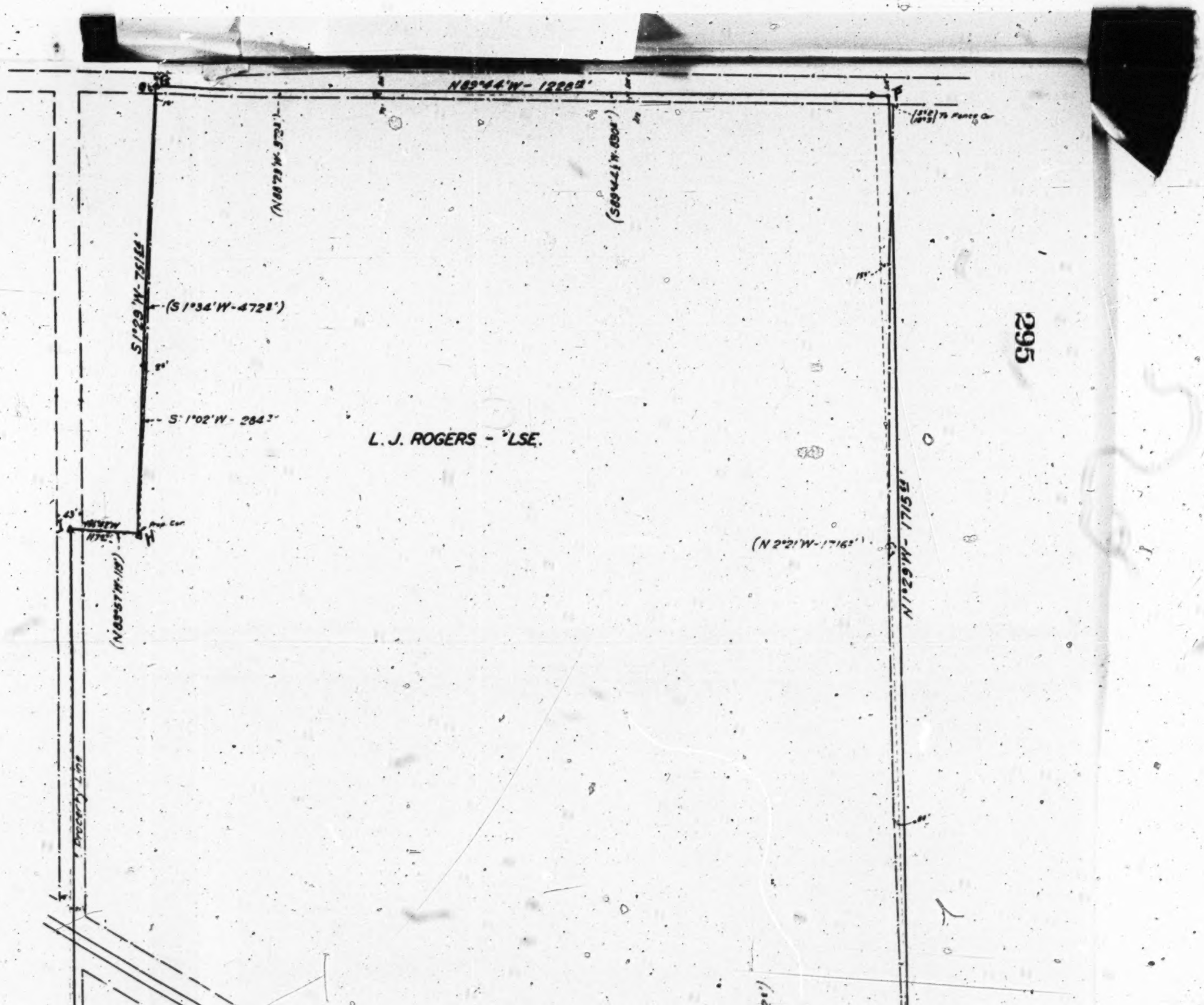
J. W. AKIN."

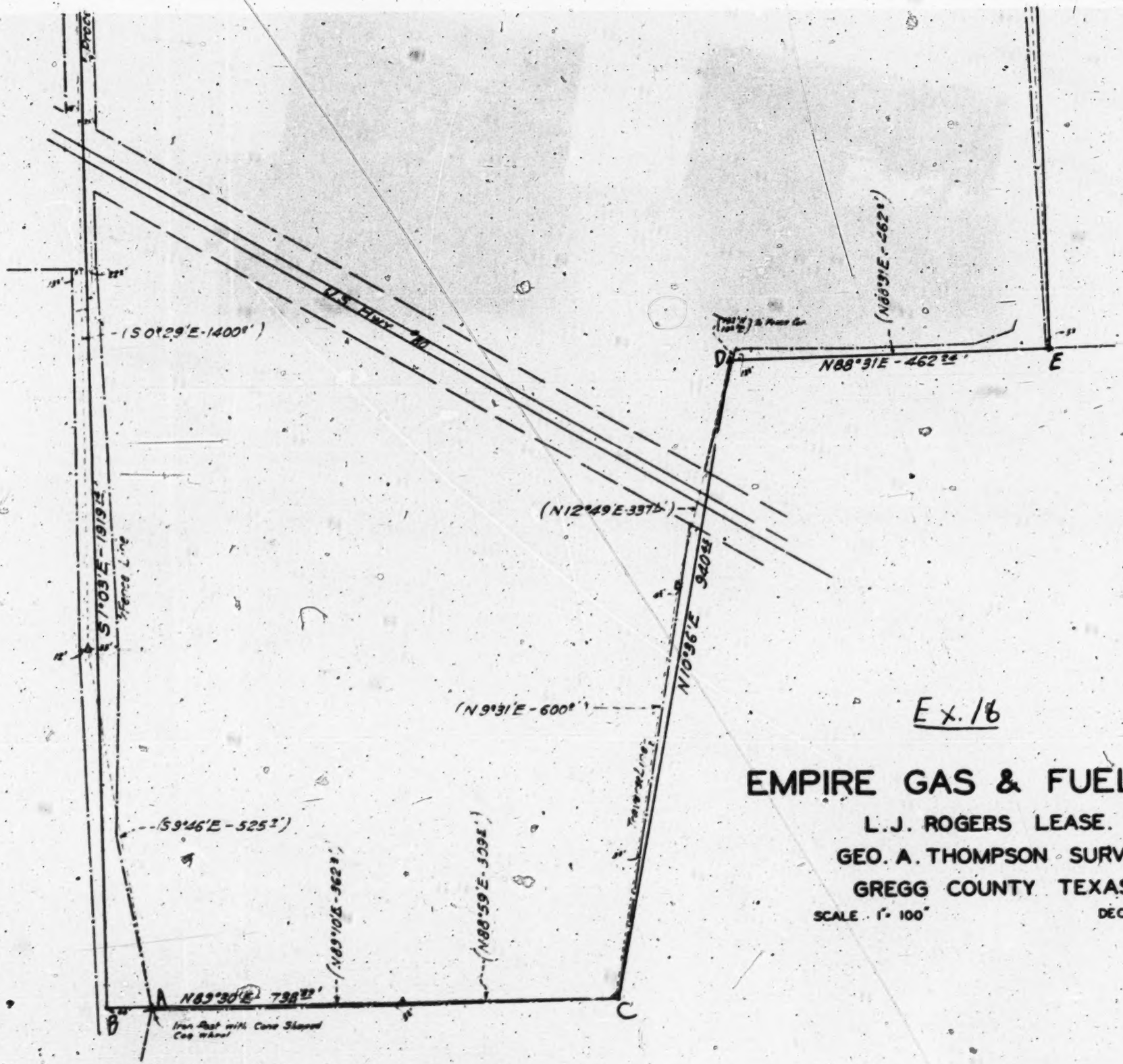
(Acknowledgment.)

Counsel for Complainant:
"We close."

Counsel for Defendants:
"We close."

The Court took the case under advisement.


N89°44'W - 1228.2'
(S89°44'W-1230')
(N89°44'W-1228')
S1°22'W - 4715.2'
(S 1°34'W-4728')
S 1°02'W - 284.3'
L. J. ROGERS - LSE.
(N 2°21'W-1716')
N1°29'W - 1715.8'
(N89°53'W-1811')
295



Ex. 16

EMPIRE GAS & FUEL CO.

L.J. ROGERS LEASE.

GEO. A. THOMPSON SURVEY.

GREGG COUNTY TEXAS.

SCALE 1" = 100'

DEC. 14.1934.

EXHIBIT No. 38.

EXHIBIT No. 38-A.

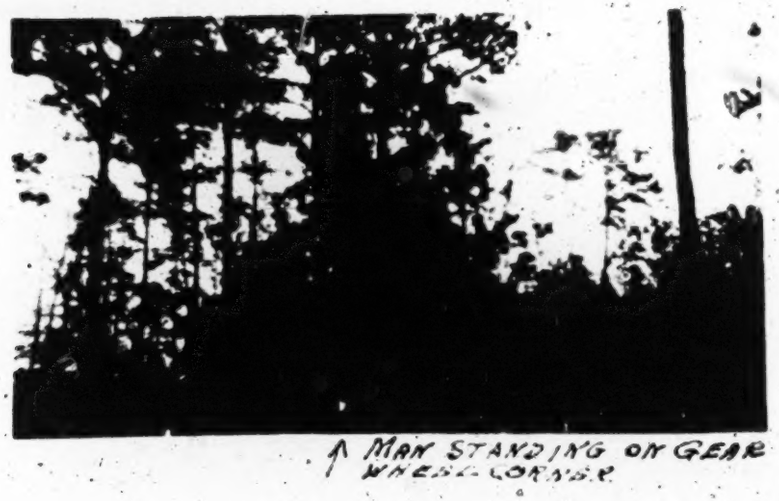


EXHIBIT No. 39.

EXHIBIT No. 40.

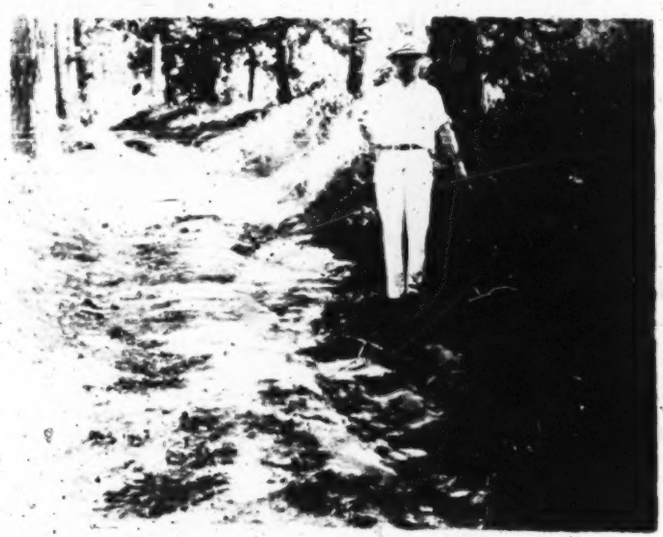


EXHIBIT No. 41.

EXHIBIT No. 42.

284 Agreement of Counsel.

We, the undersigned attorneys of record for the respective parties in this cause, hereby agree that the foregoing constitutes a full, true and correct statement of all the evidence and bill of exceptions in the case of Empire Gas & Fuel Company v. B. P. Dunlap, et al., No. 803, in Equity, Tyler Division of the United States District Court in and for the Eastern District of Texas, and hereby approve the same.

Witness our hands this the 10 day of May, 1938.

H. J. PATTERSON,
DAVID B. TRAMMELL,
CLAYTON L. ORN,
Attorneys for Complainant.
WYNNE & WYNNE,
Attorneys for Defendants.
ANGUS G. WYNNE.

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285 JUDGE'S APPROVAL

The foregoing record of 167 [typewritten] pages, being numbered 1 to 167, inclusive, having been approved by counsel for the respective parties, and having been examined and found correct, said record is hereby approved as a statement of all the evidence and bill of exceptions in the case of Empire Gas & Fuel Company v. B. P. Dunlap, et al., No. 803 in Equity, Tyler Division of the United States District Court in and for the Eastern District of Texas, and ordered filed as a part of the record in said cause. The portions of testimony copied in this statement in question and answer form are hereby approved.

The acknowledgments to the instruments introduced in evidence are omitted from this statement for the pur-

pose of shortening the record, there being no issues raised in this Court concerning said acknowledgments.

Approved at Sherman, Texas, this the 15th day of June, A. D. 1938.

RANDOLPH BRYANT,
United States District Judge.

Filed May 26, 1938.

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286 PETITION FOR APPEAL.

In the District Court of the United States, for the Eastern District of Texas, Tyler Division.

Empire Gas & Fuel Company, Cities Service Oil Company, (Formerly Empire Oil & Refining Company), Substitute Complainant,

vs. No. 803—Equity.

B. P. Dunlap, et al.

To the Honorable Randolph Bryant, Judge of the District Court Aforesaid:

Cities Service Oil Company (whose corporate name formerly was Empire Oil & Refining Company), a corporation, incorporated under the laws of the State of Maine, substituted as Complainant in this case in lieu of the original Complainant, Empire Gas & Fuel Company, a corporation, incorporated under the laws of the State of Maine, feeling aggrieved by the decree entered in the above entitled and numbered cause on the 30th day of April, A. D. 1938, hereby appeals from said decree to the United States Circuit Court of Appeals for the Fifth Circuit. The errors upon which this appeal is based are contained in the assignment of errors filed herewith. Appellant further shows to the Court that it is the only party interested in such appeal.

The decree entered herein is that petitioner does not own the oil and gas leasehold estate on the tract of land described in paragraph 2 of said decree, and should take nothing against defendants, B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband, Azzie Waskom, Curtis M. Willock and J. B. Parker, and that said bill is dismissed for want of equity; and that defendant, B. P. Dunlap, on his cross-action filed herein, have of and recover from petitioner, Cities Service Oil Company (formerly Empire Oil & Refining Company) judgment and decree quieting his title and possession of the oil and gas leasehold estate on said
287 tract of land described in paragraph 2 of said decree; that Curtis M. Willock and J. B. Parker are bound by the decree. Petitioner desires to appeal from the entire decree, which dismissed said bill of complaint for want of equity, and quieted B. P. Dunlap in his title and possession of the said land and premises on his cross-action filed herein. This petition is filed at the same term of the Court at which the decree was entered.

Wherefore, appellant prays that its appeal be allowed; that a citation to B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband, Azzie Waskom, Custis M. Willock and J. B. Parker be issued in accordance with law; and that an authenticated transcrip of the record, proceedings and exhibits on the trial be forwarded to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana. Your petitioner further prays that an order be made, fixing the amount of security to be given by appellant, conditioned as provided by law.

DAVID B. TRAMMELL,
CLAYTON L. ORN,
Attorneys for Appellant.

Filed June 15, 1938.

288 ASSIGNMENTS OF ERROR.

(Title Omitted.)

The Complainant files the following assignment of errors upon which it will rely on appeal to the United States Circuit Court of Appeals for the Fifth Circuit:

I.

The Court erred in entering the decree filed herein after making the findings of fact, because an instrument which partitions or conveys land bounded by a public or private road wholly laid out on the land belonging to the grantor carries with it title to all the road even though the metes-and-bounds description by course and distance extends only to the inside edge of said road, unless said instrument expressly reserves the fee title to said road. The Court found substantially the following as the facts: (a) the four heirs of Louisa Rogers owned on February 28, 1899, the 66-foot strip of land in controversy, which was a part of the east one-half of said Thomason Survey and was situated along the west side of said east one-half; (b) that on said date said heirs employed a surveyor to make a survey for the purpose of partitioning said east one-half into three parcels; (c) that the surveyor when running the north line of the east one-half stopped at a point 880 yards west of the northeast corner, said point lacking 66 feet of going to the west line of the east one-half of said survey, and set a stake, and then surveyed south 880 yards and set another stake, leaving the 66-foot strip out for a road, at the request of said heirs, said strip then being used in part for a road; (d) that thereafter,

289 the heirs exchanged deeds, the said J. F. Rogers being partitioned a tract that the field notes in his deed when applied to the ground by course and distance (and the call for the Wiley Davis northeast corner rejected) extended only to the inside (east) line of

said road, and not to the west line of the east one-half of said survey (outer edge of said road); (e) that the heirs of J. F. Rogers, on October 20, 1930, made an oil and gas lease to W. P. Chandler, using the same metes and bounds description that was contained in the partition deed to J. F. Rogers, which lease was subsequently acquired by Complainant; and (f) that subsequent to said Chandler lease, and after same had been recorded, defendant Dunlap acquired from the heirs of Louisa Rogers, an oil and gas lease that described the 66-foot strip, so that the east line of said strip was coincident with the west line of the tract of land described by metes and bounds in the partition deed to J. F. Rogers, after rejecting the call for the Wiley Davis northeast corner. Under said findings of fact, Complainant's lessors acquired by said partition deed the fee simple title to all of said 66 foot strip since his field note description by course and distance went to the inner edge of the road, which road was wholly laid out on land belonging to his grantors, and Complainant likewise acquired an oil and gas lease thereon and was entitled to a decree quieting its title.

II.

The Court erred in making and entering findings of fact Nos. 14 and 15 as follows:

"14. The Court finds that J. F. Rogers never acquired title under the partition deed executed February 28, 1899, to the strip of land situated between a line run South from the Wiley Davis northeast corner and a line run South from a point 880 yards west of the northwest corner of the Thomason Survey to the gear shaft. The Court finds that J. F. Rogers never acquired title under said partition deed to said strip, but that all land lying between a line run south from the Wiley Davis Northeast corner and a line run south from a point 880 yards west of the northeast corner of said Thomason Survey was not covered

by said deed. When Mrs. L. J. Rogers and her
290 two children made, executed and delivered to W. P. Chandler, on October 20, 1930, the oil and gas lease under which Complainant claims title to the strip, said Mrs. L. J. Rogers and her children did not own the fee simple title to all of said strip of land, but said fee simple title was then owned by the said heirs of Louisa Rogers, deceased.

15. The Court finds that the oil, gas and mineral lease and leasehold estate of Complainant, Empire Oil & Refining Company, originally executed in favor of W. P. Chandler, dated November 18, 1930, does not cover nor include any land west of a line running north from the old bevel gear and said oil and gas lease does not cover and include the 66 foot strip situated between the line running south from the Wiley Davis northeast corner, wherever situated, and a line running south from a point on the north line of the Thomason Survey 880 yards west of the northeast corner to the gear shaft, and that the West line of plaintiff's lease coincides with the East line of the Dunlap lease."

For the reasons set forth in Complainant's objections and exceptions to the findings of fact and conclusions of law, paragraph 4 of Section IV as follows:

"(4) The finding is contrary to the law when applied to the other findings of the Court because the Court has found that the 66 foot strip was being used as a road at the time of the partition and has found that the course and distance calls of the field notes in the partition deed to J. F. Rogers extended only to the East (inner) edge of said road. Therefore the Court should have found that the title to said strip passed to J. F. Rogers under the partition deed subject to the easement, it being the law that where a road is wholly laid out on property of the grantor, the grantee will take fee title to all the road

where the field note description goes to the inner edge of said road."

III.

The Court erred in entering the decree filed herein because the Rogers' heirs in 1899 delivered to J. F. Rogers a partition deed describing the land as "starting at the Northeast corner of Lot No. 2, which is the Northwest corner of the W. H. Rogers tract, Lot No. 1, running West 440 yards to Wiley Davis Northeast corner; thence South 880 yards," etc., vesting J. F. Rogers with the legal title to all land lying between the North west corner of Tract No. 1, partitioned to W. H. Rogers and the Wiley Davis Northeast corner, even though the call for 440 yards lacked 66 feet of going to said Davis Northeast corner. Whatever interest remained in the grantors the said partition deed, by reason of any mistake in inserting the call for the Wiley Davis Northeast corner, was an equity, of which there was no written record, and Complainant and its predecessor in title, Chandler, having purchased the oil and gas lease from J. F. Rogers' widow and heirs, without notice of any equity in the heirs of Louisa Rogers, and without notice that the said call for the Wiley Davis Northeast corner was inserted through mistake, was justified in relying on the legal presumption that a call for adjoinder will control a call for distance, and the legal presumption that the parties intended to partition all the land and not leave small irregular strips. A decree should have been entered quieting Complainant's title to all land lying between the Northwest corner of Lot No. 1 and the Wiley Davis Northeast corner, even though said corners were 440 yards plus 66 feet apart.

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IV.

The Court erred in making and entering the following conclusions of law:

"2. That the call for the Wiley Davis corner in the partition deed of 1899 and subsequent instruments following

such deed call, should be rejected as inserted by mistake, and controlling effect should be given to course and distance from the known and undisputed northeast corner of the Thomason Survey, and other known and undisputed corners, line trees and corners agreed to be correct at the trial, for such construction is most consistent with the intention of the parties to the deeds from the entire description and the equities of the case from all the facts, and is most consistent with the construction of the calls by the parties themselves, as evidenced by their acts and conduct over a period of about 30 years subsequent to the date of the partition and prior to discovery of oil in East Texas.

3. The Respondent Dunlap is entitled to have the title to such tract of land quieted as against Complainant on his plea for affirmative relief.

4. The Court concludes that extrinsic evidence was admissible to show that the surveyor Simmons, at the time he made the partition survey, placed a stake at a point 880 yards west of the northeast corner of the said Thomason Survey for the northwest corner of the J. F. Rogers tract, and another stake 880 yards south thereof at a point now, and for more than 30 years, located by the old gear wheel. Also, extrinsic evidence was admissible to prove that one of the stakes was removed and the gear-shaft placed where said stake was originally driven, as the Court concludes that the correction lease obtained either does not cover the 66 feet involved in this controversy or it takes in more land than it was represented to cover at the time it was obtained."

292 For the reasons set forth in Complainant's objections to the conclusions of law, paragraph 3 of Section VIII. as follows:

"(3) Complainant being an innocent purchaser under a chain of transfers calling for the Wiley Davis North-

east corner was entitled to rely upon said call for adjoinder and parol testimony was not admissible against it to show that the call for the Wiley Davis Northeast corner was inserted through a mistake of the Rogers' heirs. Complainant was entitled to rely upon the presumption of law that where owners executed partition deeds they intended to partition all the land and not leave small, irregular shaped tracts unpartitioned and was further entitled to rely upon the presumption that the parties intended to partition the whole tract of land because there was no express exception of said 66 foot strip. There was no testimony introduced showing that Complainant knew that the distance of the North line called for in the partition deed would not reach the Wiley Davis Northeast corner."

V.

After Complainant had introduced in evidence a deed from the heirs of Louisa Rogers partitioning to J. F. Rogers a tract of land with field note calls "starting at the Northeast corner of Lot No. 2, which is the Northwest corner of the W. H. Rogers tract, Lot 1, running West 440 yards to Wiley Davis Northeast corner; thence South 880 yards," under which deed Complainant claimed title to said strip, and after the evidence had shown that in order to reach the Wiley Davis Northeast corner the distance must be extended 66 feet over the call of 440 yards, the Court erred in overruling Complainant's objections to the testimony of defendant, F. E. Rogers, on direct examination given on behalf of defendants, as follows:

"When we went to partition the same, we employed J. H. Simmons to make a survey. I knew Mr. Simmons and Mr. Simmons is the same man who surveyed out the West half as testified by Mr. York. We employed him a long time after 1880 when he had established the red oak and the post oak tree.

When he came out to make the survey, I went with him. We four boys were the chain-carriers.

Q. What did you say to Mr. Simmons, and what did he say to you, about the partition of the land, and how you would partition it?

Counsel for Complainant:
May we have an objection to all of this as irrelevant and immaterial, and incompetent in view of the calls in the deed, which call from a point to a point, the Northwest corner of our tract calling for an adjoinder of the Wiley Davis tract outside of this land? It varies the terms of a written instrument.

293 The Court:
The objection is overruled.

Counsel for Complainant:
We except; and may we have a general objection and exception to all that, so we need not repeat it?

The Court:
Yes.

(Direct Examination Resumed.)

Counsel for Defendants:
Q. Tell what you said to Mr. Simmons?
A. I asked him if he could do some surveying for us; and he said he could, and came down. And he said: 'Do you know of a definite corner that we can start from.'"

Counsel for Complainant:
"We object—"

The Court:
"It was in fact a partition, wasn't it?"

(Direct Examination Resumed.)

Counsel for Defendants:

"Mr. Simmons went to the Northeast corner of the old home place and he found the markers that looked like they had been there for ages and ages. That is the Northeast corner represented by the fence corner up there at the Northeast corner of the 25 acre tract. If this map (Exhibit No. 14) represents the 320 acres we began at the Northeast corner.

I told him I wanted him to divide that land into four 80 acre blocks. He ran West 440 yards and then ran South what we would term one-half of the ground, 880 yards, I believe. He then ran back to the East line and established that tract as Block No. 1. That made a block 440 yards by 880 yards and that was Block No. 1 to W. H. Rogers."

Counsel for Complainant:

"Of course nothing in the field notes indicated that, and we object for the reasons stated."

The Court:

"I understand. Your objection and exception goes separately to all this character of testimony."

(Direct Examination Resumed.)

Counsel for Defendants:

"Mr. Simmons then came back and started to surveying off Block No. 2, which was the J. F. Rog.rs tract. He came back to the North line and ran over 440 yards for the 80 acre marker and he said 'Boys, you have got a chain here left over there, and my two oldest brothers said: 'We will just keep that like it is.' We were using that for a road at that time of year. We had sold the mill but the road was still there. That is at the Northwest corner.

He drove his stake right at 440 yards and then he went South 880 yards. He came down to the half way point and

drove a stake in the ground there. He just put in a small piece of green pine temporarily at that point. He then went over and surveyed out the old home place for myself and my brother, J. W. He got that all into field notes and went home. The old man was old, and it was several days before he wrote up the deeds, then, when he delivered the deeds, we carried them to W. E. Foshee, a Notary Public in Gladewater, and signed them up. My older brother, John, and myself were single; and the other two boys were married. They had homes on those blocks and we were single; and we just blocked ours together.

We two single boys took the South end. That stake that Mr. Simmons drove at the Southwest corner of the J. F. Rogers tract and the Northwest corner of mine and my brother's tract was where the old gear wheel is now.

294 Q. Here is the gear wheel right here.

Counsel for Complainant:

"We object to all those stakes, and the gear wheel, as not being called for in any instrument."

The Court:

"Yes. Objection overruled, and exception allowed to all such testimony."

"I do not know what became of that stake that was placed there by Mr. Simmons at the time he made the survey. There is a pinion shaft out of an old sawmill there now.

VI.

The Court erred in making and entering the following conclusions of law:

"4. The Court concludes that extrinsic evidence was admissible to show that the surveyor Simmons, at the

time he made the partition survey, placed a stake at a point 880 yards west of the northeast corner of the said Thomason Survey for the northwest corner of the J. F. Rogers tract, and another stake 880 yards south thereof at a point now, and for more than 30 years, located by the old gear wheel. Also, extrinsic evidence was admissible to prove that one of the stakes was removed and the gear shaft placed where said stake was originally driven, as the Court concludes that the correction lease obtained either does not cover the 66 feet involved in this controversy or it takes in more land than it was represented to cover at the time it was obtained."

For the reasons set forth in Complainant's objections and exceptions to the findings of fact and conclusions of law paragraph 3, Section VIII, as follows:

"(3) Complainant being an innocent purchaser under a chain of transfers calling for the Wiley Davis Northeast corner was entitled to rely upon said call for adjoinder and parol testimony was not admissible against it to show that the call for the Wiley Davis Northeast corner was inserted through a mistake of the Rogers' heirs. Complainant was entitled to rely upon the presumption of law that where owners executed partition deeds they intended to partition all the land and not leave small, irregularly shaped tracts unpartitioned and was further entitled to rely upon the presumption that the parties intended to partition the whole tract of land because there was no express exception of said 66 foot strip. There was no testimony introduced showing that Complainant knew that the distance of the North line called for in the partition deed would not reach the Wiley Davis Northeast corner."

VII.

The Court erred in entering the decree filed herein after making a finding of fact that at the time Mrs. L. J. Rogers,

widow of J. F. Rogers, and her children executed and delivered to W. P. Chandler the oil and gas lease held by Complainant, the fee simple title to said strip was owned by the heirs of Louisa Rogers, deceased, because
295 Mrs. L. J. Rogers and her children had inherited from J. F. Rogers the undivided one-fourth interest in the estate of Louisa Rogers, deceased and had inherited from J. W. Rogers, a deceased heir of Louisa Rogers, an undivided one-third of one-fourth of the estate of Louisa Rogers, deceased, and owned, according to the Court's own findings of fact an undivided one-third interest in and to said strip of land at the time said lessors, Mrs. L. J. Rogers and her children delivered said oil and gas lease to W. P. Chandler, which lease contained the clause: "it being the intention to include all land owned or claimed by lessor in said survey." It therefore appears that it was the clear intention of the lessors to convey to the said W. P. Chandler all their interest in the G. A. Thomason Survey which, under the Court's findings would have included an undivided one-third interest in said strip of land.

VIII.

The Court erred in making and entering conclusions of law Nos. 1 and 3, whereby the Court concluded in substance that Complainant's oil and gas lease did not constitute a cloud on the title of defendant to said 66 foot strip and defendant Dunlap was entitled to have his title to said strip quieted as against Complainant on his affirmative relief for the reasons set forth in Complainant's objections to the conclusions of law under Section VIII paragraph 4 said objections being in substance that even though the partition deed to J. F. Rogers did not cover and include said 66 foot strip, the lessors in the W. P. Chandler lease owned by inheritance from W. H. Rogers and J. F. Rogers, heirs of Louisa Rogers, deceased, an undivided one-third interest in said strip and title to

said undivided one-third interest passed under said lease to W. P. Chandler because of the clause that it was the intention to include all land owned or claimed in said survey.

296 IX.

The Court erred in making and entering findings of fact No. 7 as follows:

"J. H. Simmons, in making the survey for W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers, prior to the execution of said deeds, began at the northeast corner of said G. A. Thomason Survey and measured west along the north line of said Thomason Survey a distance of 440 yards, set a stake and then measured south a distance of 880 yards, and then measured east a distance of 440 yards. From this work on the ground J. H. Simmons prepared the description contained in the deed from the three brothers to W. H. Rogers, covering tract No. 1 of 75-4/5 acres.

In making a survey on the ground for tract No. 2 J. H. Simmons began on the north line of the Thomason Survey at a point 440 yards west of the northeast corner of said survey, being at the point he had determined as the northwest corner of tract No. 1, and ran a line west along the north line of said Thomason Survey a distance of 440 yards and there set a stake for the northwest corner of Lot No. 2, and told the four Rogers boys, who were accompanying him on the survey, that there was a chain left between the point where he had stopped and set the stake, after measuring 880 yards from the northeast corner of said Thomason Survey and the northwest corner of their land, after measuring 880 yards from the northeast corner of the survey it was about one chain (66 feet) to the northwest corner of their land, which corner, from a fair inference from the evidence, was the northeast corner of the Wiley Davis land, though

the surveyor Simmons did not mention the Davis corner to the Rogers boys at the time of the survey; neither did he survey to said corner; nor did he endeavor to locate said corner at the time he was making the partition for the Rogers boys. The four Rogers boys, viz., W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers, who were with said J. H. Simmons, informed him that they would leave the 66 feet out of the partition and use the same jointly and keep it like it was; the same 66 foot tract was then being used in part as a logging road.

At the time of the partition, the east one-half of the Thomason Survey "was rated at 320 acres", and when Mr. Simmons was employed to make the survey, he was told by F. E. Rogers that the four Rogers boys, who were the owners, wanted him to divide the land into four 80-acre blocks. After J. H. Simmons set the stake for the northwest corner of tract No. 2 at a distance of 880 yards from the northeast corner of the Thomason Survey, he measured South a distance of 880 yards and there set a stake, at a point now evidenced by the old gear wheel, placed there soon thereafter as a corner stake, where it has remained for more than thirty years. The deeds to partition the four 80-acre blocks for the heirs of Rogers were prepared from the survey made upon the ground by J. H. Simmons, though the south portion of the partition was from a calculation. The field notes were not prepared for several days after the survey was made upon the ground."

For the reasons set forth in Complainant's objections and exceptions to the findings of fact, paragraph 2 of Section I, as follows:

"(2) The finding is against the overwhelming weight and great preponderance of the credible testimony because the field notes in the handwriting of the surveyor introduced in evidence showed that the surveyor did not measure across the North line of the East one-half of said Thomason Survey but measured across the South line of

the North one-half of the East one-half of said
297 survey to the Bozeman line, which line was well known to the surveyor and was the East line of the West one-half of said survey."

X.

The Court erred in making and entering findings of fact No. 16, as follows:

"16. The Court finds that the call for the Wiley Davis northeast corner contained in the partition deed from W. H. Rogers and others to J. F. Rogers, dated February 28, 1899, was inserted through mistake, and the Surveyor set a stake 880 yards west of the northeast corner of said Thomason Survey, and another stake south at 880 yards where the gear shaft now stands, to mark the west line of the J. F. Rogers tract, although the partition deed did not call for said two stakes. The Court finds that the stake set by Simmons on the north line 880 yards from the northeast corner disappeared prior to the trial of this cause."

For the reasons set forth in Complainant's objections and exceptions to the findings of fact, paragraph 2 of Section V, as follows:

"(2) The finding is against the overwhelming weight and great preponderance of the credible testimony because the field notes in the handwriting of the surveyor introduced in evidence showed that the surveyor did not measure across the North line of the East one-half of said Thomason Survey but measured across the South line of the North one-half of the East one-half of said survey to the Bozeman line, which line was well known to the surveyor and was the East line of the West one-half of said survey; and there was no evidence of a mistake in inserting the call for the Wiley Davis Northeast corner."

XI.

The Court erred in making and entering the last paragraph of findings of fact No. 13 as follows:

"The northwest corner of the W. H. Rogers tract No. 1, referred to as being at the Northeast corner of Lot No. 2 in the correction lease given by the heirs of J. F. Rogers to the Empire Gas & Fuel Company, Complainant, was located at a point 440 yards west of the northeast corner of the G. A. Thomason Headright Survey No. 175."

For the reasons set forth in Complainant's objections and exceptions to the findings of fact and conclusions of law, Section III, as follows:

"Complainant objects and excepts to the last paragraph of section 13 of the Court's findings of fact because the said finding is not supported by any competent and admissible testimony and is against the overwhelming weight and great preponderance of the credible testimony."

298 XII.

The Court erred in making and entering findings of fact No. 17, as follows:

"The Court finds that the oil and gas lease under which Respondent, B. P. Dunlap, claims, covers and includes such strip of land 66 feet wide and complainant's oil and gas lease, nor its purported corrected lease, do not cover said strip. The ratification or correction lease covers the same land as the original lease, the only difference being a change from yards to feet in the description, calls and a correction of an obvious error in one of the calls of the original lease. Such was the representation at the time the correction lease

was obtained, and such correction lease called to begin as follows: 'Being a part of the G. A. Thomason Headright, starting at the northeast corner of Lot No. 2, which is the northwest corner of the W. H. Rogers tract No. 1'; and the Court finds that the northwest corner of W. H. Rogers tract No. 1 was partitioned and surveyed at the time of the partition to be at a point 440 yards west of the northeast corner of the G. A. Thomason Headright Survey."

For the reasons set forth in Complainant's objections and exceptions to the findings of fact and conclusions of law, Section VI, as follows:

"Complainant objects and excepts to all of section 17 because the finding is not supported by competent evidence and is against the great weight of credible testimony."

XIII.

The Court erred in making and entering that part of the findings of fact No. 7 wherein the Court found that the 66 foot strip was being used in part as a logging road, for the reasons set forth in Complainant's objections and exceptions to the Courts findings of fact and conclusions of law, paragraph 5, Section I, which are as follows:

"The finding that the 66 foot strip was being used in part as a logging road is unsupported by any competent testimony because all the testimony showed that the 66 foot strip was being used for a road."

XIV.

The Court erred in overruling Complainant's motion to dismiss defendants' cross-action, said motion being as follows:

"(a) The allegations contained in the cross-action are insufficient in equity to state any cause of action against Complainant;

(b) The allegations are vague, uncertain and indefinite and do not apprise Complainant of what the said defendants expect to prove thereby;

299 (c) The allegations contained in said cross-action are repugnant, conflicting, and mutually destroy each other, and are in the alternative contrary to the Rules of Equity;

(d) Said allegations are argumentative and conclusions of law and no specific fact is stated showing that, in equity, said defendants are entitled to the relief for which they pray;

(e) The said allegations are insufficient in equity to allege or prove that the defendants ever owned title to the said land involved in said cross-action.

XV.

The Court erred in failing to find the facts as contained in Complainant's Requested Findings No. I as follows:

"The Court finds from the evidence introduced and the agreement of the parties made during the trial of this cause, that the tract of land conveyed and covered by the deed from Augustus Rogers to Louisa Rogers of September 6, 1882, is that portion of the G. A. Thomason Survey lying East of a line beginning 967 varas West of the Southeast corner of the Thomason Survey, and extending North to the Northeast corner of the M. O. Sheppard 36 acre tract and thence North, intersecting the North line of the said G. A. Thomason Survey at a point 982.4 varas West of the Northeast corner of said survey. The Court

further finds that the field notes as located on the ground and the boundaries of the tract of land conveyed to Louisa Rogers aforesaid covered and included the 66 foot strip of land involved in this controversy, it being the intention of the grantor in said deed to convey the East one-half of said G. A. Thomason Survey and it further being agreed between the parties to this lawsuit that the East one-half was separated from the West one-half by a line running from a point 967 varas West of the Southeast corner of the Thomason Survey North to the Northeast corner of the M. O. Sheppard 36 acre tract and thence North intersecting the North line of said Thomason Survey at a point 982.4 varas West of the Northeast corner of said survey."

For the reason that such facts are supported by competent evidence, and there is a total absence of competent evidence to support a contrary finding. The Court overruled said request and Complainant excepted as shown by the order filed herein.

XVI.

The Court erred in failing to find the facts as contained in Complainant's Requested Finding No. V as follows:

"The Court finds that on February 28, 1899, W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers intended to divide and partition all of the land they owned in the Thomason Survey by inheritance from their mother, Louisa Rogers, and said heirs owned said 66 foot strip in controversy. The said heirs intended to partition to J. F. Rogers Tract No. 2, described in the deed from W. H. Rogers et al to J. F. Rogers, and purposely and intentionally inserted the call for the Wiley
300 Davis Northeast corner, and intended for the Northwest corner of said tract No. 2, partitioned to J. F. Rogers to be coincident with the Northeast corner

of the J. W. (Wiley) Davis tract of land. The said Rogers heirs further intended for the West line of said tract No. 2 and the East line of the J. W. Davis tract and the East line of the Bozeman tract to be conterminous, because they did not intend to leave unpartitioned the said 66 foot strip then and now being used as a road, said strip being situated along the West side of the tract they had inherited from their mother, Louisa Rogers, and a part of said tract of land owned by Louisa Rogers being covered and included in the field note description in her deed."

For the reason that such facts are supported by competent evidence, and there is a total absence of competent evidence to support a contrary finding. The Court overruled said request and Complainant excepted as shown by the order filed herein.

Wherefore, Empire Oil & Refining Company (whose corporate name is now Cities Service Oil Company), Complainant and the Appellant herein, prays that the decree in this cause be reversed and rendered or, in the alternative, reversed and remanded, with instructions to the Trial Court as to further proceedings therein, and for such other and further relief as may be just in the premises.

DAVID B. TRAMMELL,
CLAYTON L. ORN,
Attorneys for Appellant.

H. J. PATTERSON,
PHILLIPS, TRAMMELL, ESTES,
EDWARDS & ORN,
Of Counsel for Appellant.

Assignments of Errors, Filed June 15, 1938.

301 ORDER ALLOWING APPEAL.

(Title Omitted.)

On this day came Cities Service Oil Company, substitute Complainant in the above entitled and numbered cause, whose corporate name heretofore was Empire Oil & Refining Company, and who was substituted as Complainant in lieu of Empire Gas & Fuel Company, having heretofore filed herein its petition for appeal from the decree entered herein on the 30th day of April, A. D. 1938, and presented its petition for an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, New Orleans, Louisiana;

It appearing to the Court that said petition for appeal has been filed at the same term of Court at which the decree was entered herein and that the said term of Court is still open for the purpose of this appeal;

It is Ordered that an appeal to the United States Circuit Court of Appeals for the Fifth Circuit from said decree heretofore entered herein be and the same is hereby allowed and that a certified transcript of the record be forwarded to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana.

It is further Ordered that the appellant furnish a bond on appeal in the amount of $1,000.00, the same to operate as a costs bond only.

Entered this the 15th day of June, A. D. 1938.

RANDOLPH BRYANT,
Judge.

Filed June 15, 1938.

302 APPEAL BOND.

(Title Omitted.)

Know All Men By These Presents that we, Cities Service Oil Company, a corporation, as principal, and the others whose names are signed hereto as sureties, are held and firmly bound unto B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband, Azzie Waskom, Curtis M. Willock and J. B. Parker in the full and just sum of One Thousand Dollars ($1000.00), to be paid to the said B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband, Azzie Waskom, Curtis M. Willock and J. B. Parker, their heirs, executors, administrators, successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 15th day of June, A. D. 1938.

Whereas, lately, at the February Term of the United States District Court for the Eastern District of Texas, Tyler Division, in a suit pending in said Court between Cities Service Oil Company, substituted as Complainant, in lieu of Empire Gas & Fuel Company, and B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband, Azzie Waskom, Curtis M. Willock and J. B. Parker, defendants, cause numbered 803 in Equity, a decree was rendered against the said Cities Service Oil Company at the February Term of Court, in which decree the Court dismissed the bill of complaint

303 for want of equity and quieted B. P. Dunlap in his title to and possession of the land described in said decree on his cross-action filed herein, and the said Cities Service Oil Company has petitioned for and been allowed by the United States District Court for the Eastern District of Texas, Tyler Division, an appeal to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, and the defendants have signed stipulations waiving the issuance and service of citations and said stipulations and waivers have been filed herein;

Now, Therefore, the condition of this obligation is such that if the said Cities Service Oil Company shall prosecute said appeal to effect and pay all costs if it fails to make good its plea, then the above obligation to be void, else remain in full force and virtue.

CITIES SERVICE OIL COMPANY,
By CLAYTON L. ORN,
Its Attorney of Record; Principal.
SEABOARD SURETY COMPANY,
By B. F. ALLEN,
Attorney in Fact; Surety.

The Surety herein is acceptable on Federal bonds.

MARJORIE MINTON,
United States District Clerk,
By SUSIE KERR, Deputy.

Examined and approved this the 15th day of June, 1938.

RANDOLPH BRYANT,
Judge.

Filed June 15, 1938.

306 PRAECIPE AND ACKNOWLEDGMENT OF SERVICE.

(Title Omitted.)

To the Clerk of the United States District Court, for the Eastern District of Texas, Tyler Division:

Madam:

You will please prepare and incorporate in the transcript of record for filing forthwith in the Honorable Circuit Court of Appeals for the Fifth Circuit, a transcript of the record in the above cause containing the following papers:

1. Caption.

2. Bill of complaint of Empire Gas & Fuel Company, filed December 18, 1934.

3. Motion of defendant, B. P. Dunlap, to dismiss bill of complaint.

4. Motion of defendants, J. T. Brewer and wife, Garnett Brewer, B. F. Phillips, J. R. Bozeman and wife, Olga Bozeman, to dismiss bill of complaint.

5. Motion of defendants, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, J. E. Rogers, Ola Mae Rogers, Elvie (Rogers) Waskom and Azzie Waskom to dismiss bill of complaint.

6. Order of dismissal as to defendants J. T. Brewer and wife, Garnett Brewer, B. F. Phillips, J. R. Bozeman and wife, Olga Bozeman.

7. Waiver of subpoena and entering appearance of J. B. Parker and Curtis M. Willock.

8. Motion of Empire Gas & Fuel Company for leave to file amended bill of complaint.

9. Order granting Empire Gas & Fuel Company leave to file amended bill of complaint.

10. Empire Gas & Fuel Company's amended original bill of complaint, filed January 11, 1936.

11. Answer of defendants, B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband, Azzie Waskom, and cross-action filed January 27, 1936.

12. Complainant's replication to answer and cross-action of defendants.

13. Joint motion of Empire Gas & Fuel Company and Empire Oil & Refining Company to substitute Empire Oil & Refining as complainant.

14. Order substituting Empire Oil & Refining Company as complainant for Empire Gas & Fuel Company.

307 15. Decree entered and filed April 30, 1938.

16. Court's findings of fact and conclusions of law.

17. Complainant's objections and exceptions to Court's findings of fact and conclusions of law.

18. Complainant's request for additional findings of fact and conclusions of law.

19. Order of the Court overruling and denying complainant's request for additional findings of fact and conclusions of law.

20. Order of the Court overruling complainant's objections and exceptions to the Court's findings of fact and conclusions of law.

21. Motion of complainant to permit appeal in the name of Cities Service Oil Company.

22. Order of Court permitting complainant to appeal under name of Cities Service Oil Company.

23. Statement of the evidence, agreement of counsel settling statement of evidence and order of Court approving statement of evidence.

24. Petition for appeal.

25. Assignment of errors.

26. Order allowing appeal.

27. Appeal bond with approval thereon.

28. Waiver of citation on appeal by B. P. Dunlap, et al.

29. Waiver of citation on appeal by Curtis M. Willock, et al.

30. Praecipe of appellant with admission of service.

31. Clerk's certificate of record.

PHILLIPS, TRAMMELL, ESTES, EDWARDS & ORN,
Attorneys for Appellant, Cities Service Oil Company (Formerly Empire Oil & Refining Company).

The undersigned attorneys of record for the appellees acknowledge service of the foregoing praecipe.

B. P. DUNLAP, F. E. ROGERS, W. H. ROGERS, MRS. L. J. ROGERS, a Widow, J. E. ROGERS and Wife, OLA MAE ROGERS, ELVIE (ROGERS) WASKOM and Husband, AZZIE WASKOM,

By WYNNE & WYNNE,
Attorneys of Record.

J. B. PARKER and
CURTIS M. WILLOCK,

By CECIL N. COOK,
Attorney of Record.

Praecipe and Acknowledgment of Service. Filed June 22, 1938.

308 CLERK'S CERTIFICATE.

The United States of America,
Eastern District of Texas, ss.

I, MARJORIE MINTON, Clerk of the District Court of the United States, for the Eastern District of Texas, in the Fifth Circuit, do hereby certify that the foregoing is a full, true and correct copy and transcript of record of all papers called for in the praecipe in cause No. 803 Equity Empire Gas & Fuel Company (Cities Service Oil Company, formerly Empire Oil & Refining Company, Substitute Complainant), v. B. P. Dunlap, et al., as the same appears on file and of record in this office.

I further certify that said transcript of record embraces only such instruments and orders as are specified in the praecipe filed by the appellant.

Witness my official signature and the seal of said District Court, at office in the City of Tyler, Texas, this the 22 day of June, A. D. 1938.

MARJORIE MINTON, Clerk,
(Seal) By SUSIE KERR, Deputy.

Waivers of Citation omitted from the printed record, the originals thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:-

ARGUMENT AND SUBMISSION.

Extract from the Minutes of November 17, 1938.

CITIES SERVICE OIL COMPANY,

No. 8863 versus

B. P. DUNLAP, ET AL.

On this day this cause was called, and, after argument by Clayton L. Orn, Esq., for appellant, and William A. Wade, Esq., for appellees, was submitted to the Court.

OPINION OF THE COURT - FILED DECEMBER 8, 1938.

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IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

No. 8863

CITIES SERVICE OIL COMPANY,
Appellant,

versus

B. P. DUNLAP, ET AL.,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Texas,

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(December 8, 1938)

Before SIBLEY, HOLMES and McCORD, Circuit Judges.

SIBLEY, Circuit Judge: The appellant, Cities Service Company, is by assignment and succession the holder of a producing oil and gas lease on a tract of land in Gregg County, Texas, made in 1930 by the heirs of J. F. Rogers. In 1934 appellee B. P. Dunlap obtained a lease upon a narrow strip of land about 68 feet wide by 880 yards long along the west side of the J. F. Rogers tract (less two acres sold off at the northwest corner) from the heirs of J. F. Rogers and his three brothers, W. H. Rogers, F. E. Rogers and J. W. Rogers. The four Rogers brothers were the heirs of Lou-

isa Rogers, who owned a rectangular tract of about 320 acres. They in February, 1899, divided it by assigning to J. F. Rogers a tract in the northwest corner, to W. H. Rogers a tract in the northeast corner, while F. E. Rogers and J. W. Rogers together took the south portion. The lease made in 1934 to Dunlap rests on the theory that a strip of land 66 or 68 feet wide along the west side was left undivided in 1899.

The lease of 1934 was recorded, and appellant as the holder of the lease of 1930, claiming the strip to be within its lease, filed in the District Court a bill to remove the cloud on its title, making Dunlap and all the Rogers parties. The defendants denied the material allegations of the bill touching the west boundary of the J. F. Rogers land, and by cross-bill set up that a call in the deed to J. F. Rogers for the "Wiley Davis northeast corner" as the northwest corner of the J. F. Rogers tract was inserted by the draftsman through inadvertence and mistake, and that the course and distance in the deed were correct and located that corner about 66 feet east of the Wiley Davis corner, and that the strip thus left between the east side of the Davis land and the west side of the J. F. Rogers land was purposely left undivided to be controlled in common; and there was a prayer to quiet title in them and their lessee. In answer to the cross-bill the complainant denied these allegations and asserted that it and its predecessors in the lease were purchasers for value in good faith and without notice of the mistake in the J. F. Rogers deed. On full findings of fact the District Court held that the extrinsic evidence of what happened in the partition, and of the intention in locating the west line of the J. F. Rogers land, was admissible; that the strip in question was not a part of the tract set off to J. F. Rogers, but that his west line began at a point 880 yards west of the northeast corner of the original tract and went thence south to

a "gear shaft" corner, and that the reference to Wiley Davis' corner was inserted in the deed by mistake. The title was accordingly quieted in the defendants. There was no express finding as to whether the complainant or its predecessors, or any of them, was a *bona fide* purchaser for value without notice. This appeal followed.

The principal questions made are: That the parol extrinsic evidence was not admissible; that the call for the Davis corner overrules the course and distance which fell short of it; that if that call be ignored the tract was nevertheless one adjoining a road, and by legal construction would include the land under the road; that the mistake, if any, was not correctible against *bona fide* purchasers; and that if all these contentions fail, still the one-fourth interest of the J. F. Rogers heirs in the strip should be held affected by appellant's lease. Appellant has a second lease made after a resurvey, and containing a differently worded description, but it was executed on the assurance that it covered nothing that was not covered by the first lease, and we agree with the ruling made below that it ought to be given no different effect.

The first lease copied exactly the calls of the partition deed to J. F. Rogers, as follows: "Being a part of the G. A. Thomas HR; starting at the N. E. corner of Lot No. 2, which is the N. W. corner of W. H. Rogers' tract, Lot No. 1, running west 440 yards to Wiley Davis' N. E. corner; thence south 880 yards; thence east 224 yards; thence north 310 yards at 12° east of north; thence east 754 yards; to W. H. Rogers' line; thence north 574 yards to the starting point; containing 68-1/5 acres more or less." On its face this survey is out of balance. The total west measurement is 440 yards. The east measurements are 224 and 574 yards, a total of 798 yards beside the easterly gain in the

line which runs 310 yards 12° east of north. All agree that the partition deeds, which are of the same date and between the same parties, recite the same consideration, and each in form a warranty deed to the grantee from the other tenants in common and duly recorded, are to be construed together as one transaction. Comparing them, it appears that the east and west line set down in the deed to J. F. Rogers as 754 yards long continues as a part of the south boundary of Lot No. 1 for 66 yards further. This entire line appears in the deed to the F. E. and J. W. Rogers part as 220 yards long, showing that 754 is a clerical error for 154, because 154 plus 66 makes 220 yards. Thus corrected, the J. F. Rogers east and west measurements approximately balance. They also work out correctly on the land. The northeast corner of the original tract is known, and is the northeast corner of Lot No. 1. The northwest corner of Lot No. 1 is by the deed to W. H. Rogers fixed 440 yards to the west, and was in 1930 a marked corner. That is the northeast corner of Lot No. 2, the J. F. Rogers tract, and the beginning and ending point for the calls in the deed to him. The northwest corner (ignoring the Wiley Davis corner) is called for as 440 yards to the west. Thence the course is south 880 chains, the deed mentioning no marker there but there being at this point a heavy iron shaft with a beveled gear on it planted, as is testified, soon after the survey to mark the corner, and it has been reputed to be the corner ever since. The courses and distances following thence, after the correction of 754 to 154 yards, reach the west line of Lot No. 2 and proceed along it to the beginning with fair accuracy. On the other hand, if the north line of Lot No. 2 is not stopped at 440 yards but is continued about 66 feet to Wiley Davis' N. E. corner, which was a known point in 1899 and ever since, and if the survey is continued thence, the bev-

eled gear shaft will be missed at the southwest corner by 66 feet, the west lines of Lot No. 1 will not be reached by that distance, nor will the beginning point be.

In the effort to include just the land the parties intended, which is the true object in all questions of boundary, shall the measurement of 440 yards for the north line prevail, or shall the call for Wiley Davis' northeast corner control? The appellant correctly contends that there is a presumption that the parties intended to divide all their land and especially not to leave a narrow strip off to one side; and that it is a general rule that courses and distances, because of the greater possibility of error in them, will yield to a call for a fixed monument, including the line or corner of an adjoiner. *Camp vs. Gulf Producing Co.*, 122 Tex. 383, 61 S. W. (2) 773; *Goodson vs. Fitzgerald*, 135 S. W. 696; 8 Am. Jur., Boundaries, §51, 53, 56. But the presumption stated is rebuttable; and the rule not without exceptions. It sometimes appears that the measurements are more likely correct than the call for some monument or adjoiner, or that such call was inserted by error; and when that is clearly true the mistaken call will be rejected and the measurements followed even in cases at law. *White vs. Luning*, 93 U. S., 514; *State vs. Sullivan*, ... Tex. ....., 92 S. W. (2) 228; *Wilson vs. Giraud*, 111 Tex. 253, 231 S. W. 1074; *Coswell vs. Foulk*, 97 S. W. (2) 341, (error refused); *Humble Oil Co. vs. State*, 104 S. W. (2) 174, (error refused); 8 Am. Jur., Boundaries, §52. In the present case the scope of the admissible evidence is enlarged by the pleaded issue that the reference to the Wiley Davis corner got into the deed through mistake. On that issue, the case being in equity, parol and other extrinsic evidence of what was done and said was plainly admissible. The court properly heard the testimony of persons who were present at the survey, and it clearly showed that the northwest corner of

Lot No. 2 was deliberately and purposely put about a chain's length east of the Wiley Davis corner so as to leave a strip undivided and under the control of all four tenants in common for the purpose of a road. The planting of the heavy gear shaft at the same distance from the Davis line at the south end powerfully sustains this testimony. Most evidently it marked a permanent corner. The evidence was admissible, and it well warranted the finding of the judge that the reference to the Wiley Davis corner as the corner of Lot No. 2 was inserted by mistake in drafting the deed. Appellant argues that the field notes of the survey contradict the witnesses as to where the surveyor went and how he located the corners of Lot No. 2. It so happens that the field notes of Lot No. 2 have not been found. Those for the other lots do not show the surveyor at or near the Wiley Davis corner, or measuring the north line 440 yards or any other length, for this line was not common to the other lots. Only the field notes for Lot No. 2 would show what was done at or near the northwest corner of that lot. There is no contradiction of the witnesses by the field notes introduced.

But appellant argues that equity will not correct a mistake as against a bona fide purchaser for value without notice, and that there is no proof that it and its predecessors in the lease were not such. The answer is that there is no sufficient proof that they were. In the law of negotiable instruments presumptions are indulged as to bona fides and want of notice, but in equity a claim to the favored position of a bona fide purchaser for value without notice is a matter of affirmative defense, and he who asserts it has the burden of proving it. Compare *United States vs. California & Oregon Land Co.*, 148 U. S. 31. It fairly appears that these lessees paid value in developing the lease, but there is no evidence at all that at the time

they paid they did not know that the west line was not the east line of Davis, or that the call for 440 yards on the north line would not reach Davis' corner, rendering the corner questionable. No well was drilled or expenditures made on this disputed strip. There being no proof of bona fides or want of notice, this plea was not sustained. The district judge held the evidence touching the intention of the parties to be admissible on the ground that the deed was ambiguous irrespective of the equitable power to correct a mistake in the deed. The cases cited above go far to sustain him, but we find it unnecessary to determine that question in view of the equitable issues pleaded.

Appellant strongly argues that although it be established that the call for the Wiley Davis corner does not belong in the deed, under settled rules of law the conveying of the land adjoining a road will carry the grantor's title to the servient fee up to the center of the road, and if the grantor has no land beyond the road the grantor's title to its further edge will pass. Such is the general rule applied both to highways and streets and alleys, non-navigable streams and railroad rights-of-way. 8 Am. Jur., Boundaries, §36, 39, 22, 25; 11 C. J. S., Boundaries, §31, 35, 45. It is based on the presumed intention of the parties that the grantor would not reserve a long, narrow strip under such way or stream for which he had no use, and partly on public policy in that such strips are likely to give rise to litigation in the distant future. But it is not unlawful to retain such a strip. If the intention to do so is clear, the contrary presumption must yield. And if the conveyance as made does not reach the highway or stream, it cannot be extended to it to avoid creating a separately owned strip. There was in 1899 no highway or street or alley covering the strip in question. A highway ran east and west through the land to be partitioned near its center. The Rogers brothers had

run a sawmill on their land, and had hauled logs along the line of Davis to this highway. It was not a publicly worked way, or an established road. About this time, the date not being clearly fixed, Davis wished to confine the travel across his place, and he testifies he gave fifteen feet along the east edge of his land for a north and south road. Several witnesses say they helped cut the road out fifteen or twenty feet wide, cutting the line trees on the Davis line because they were in the road. The big pine at the Wiley Davis northeast corner was cut close to the ground and its stump was in the middle of the road. It was thereafter a country road open to all, although little used. The fences, where there were any, on either side were sixty or seventy feet apart, but not straight, and probably were not regarded as correct line fences. The land, as we understand, was mostly in woods. The actual road was thus only twenty feet wide, and supposed to be half on the land of Davis. Assuming it to have been in existence in 1899, the northwest and southwest corners which the surveyor fixed for Lot No. 2 were about sixty-six feet from the center of this road and fifty-six feet from its margin. Neither the deed nor the field notes say anything about a road. This is not a case in which a road is mentioned as a boundary, nor one in which the boundary fixed is in fact the edge of a road either public or private. The only thing that tends to make the strip in contest a road, or the equivalent of a road, is the parol evidence that the Rogers brothers during the survey informed the surveyor, as found by the court, that "They would leave the 66 feet out of the partition and use the same jointly, and keep it like it was; the same 66 foot tract was then being used *in part* as a logging road." There was no covenant to dedicate the strip to the public as a road. It was subjected to no easement over the whole of it so as to convert the whole strip into a roadway. There is a plainly expressed intention not to

add the strip to Lot No. 2 but to retain joint control and ownership of it. Since the deed as prepared said nothing about a road as a boundary, there was no occasion to make a reservation of the land, though to some extent on its far edge it was used for a road. The case presented is not one requiring an extension of the deed beyond its true calls. In recent years a broad public road occupying most of the strip has been laid out, but this development years after the making of the deed cannot have the effect of extending its scope. 11 C. J. S., Boundaries, §35, (4).

Appellant lastly contends that its lessors at the date of its lease owned in any event a fourth interest in the strip, and it is covered by the lease because of the words in it which follow the description first above quoted: "and being the same land described in a deed from J. W. Rogers, W. H. Rogers and F. E. Rogers, February 28, 1899, Recorded Vol. R, pages 59-60, Deed Records Gregg County, Texas, save and except two acres out of the northwest corner sold to R. M. Wood, it being the intention to *include all land owned or claimed by lessor in said surveys.*" In the correctional lease the singular number is used: "Said survey". The only survey definitely mentioned consists of the courses and distances just before recited. The reference to the recorded deed to J. F. Rogers imports its contents into the lease, and there is a similar "survey" in it. The "intention clause" if applied to these adds nothing to the lease. It is, however, attempted to make it refer to the original grant to G. A. Thompson (Thomas is the name used in the lease) which contained 640 acres, but the lease does not mention any survey in that connection. The uncertainty is too great to warrant any application of this clause to land outside the limits of the surveys which are definitely set forth. Furthermore, if other land can be included under this clause the original lessee's interest in it

was not transferred to the appellant, for his deed of assignment recites the description of the J. F. Rogers deed as above quoted, omitting the "intention clause", and then transfers "all rights, title and interest of the original lessee and present owner in and to said lease and rights thereunder *in so far as it covers the above described tract.*" If the lease covered any additional land, the original lessee did not transfer his interest therein.

JUDGMENT AFFIRMED.

~~A true copy:~~
~~Test:~~

~~Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.~~

JUDGMENT.

Extract from the Minutes of December 8, 1938.

CITIES SERVICE OIL COMPANY,

No. 8863 versus

B. P. DUNLAP, ET AL.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed;

It is further ordered, adjudged and decreed that the appellant, Cities Service Oil Company, and the surety on the appeal bond herein, Seaboard Surety Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

PETITION FOR REHEARING - FILED DECEMBER 27, 1938.

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IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

CITIES SERVICE OIL COMPANY, Appellant
v.
B. P. DUNLAP, ET AL., Appellees
No. 8863

Appeal from the District Court of the United States for the Eastern District of Texas

Appellant's Motion For Rehearing

To the Honorable Circuit Court of Appeals for the Fifth Circuit:

Cities Service Oil Company, Appellant, respectfully shows to the court that in its opinion and judgment heretofore delivered and rendered on December 8, 1938, this Honorable Court erred, to Appellant's prejudice, in the following particulars:

I.

This Court erred in holding "there was in 1899 no highway or street or alley covering the strip in question" since appellees pleaded that the strip was left open for a road, and F. E. Rogers, who assisted in the survey, testified that they were using the road at the time.

In our Reply Brief at pages 3 to 5, the pleadings of the appellees are quoted, from which it appears that in Paragraph X it was expressly alleged "*that the line was stopped at 440 yards west of the northwest corner of Lot 1, purposely so that the original Rogers owners could at all times have an outlet from the north to the main public road leading from Gladewater,*" and again in Paragraph XI that "*the Rogers family desiring to leave a strip on the west side for an open roadway had said land surveyed as above alleged, to begin at the northeast corner of the survey; thence to run west 880 yards for Lots 1 and 2; thence south 880 yards to corner marked by an old gearwheel*"; and again that the "*northwest corner as established on the ground and the southwest corner as established on the ground being established at a point 68 ft. east of the line claimed by the plaintiff in plaintiff's amended bill of complaint,* **this being left out by the surveyor at the request of the Rogers family for a road to be jointly owned and controlled by the parties to the said partition.**" (R. pp. 34-35.)

F. E. ROGERS testified that when Simmons, the surveyor, started surveying off Lot No. 2, the J. F. Rogers tract, he came back to the north line and ran over 440 yards and said to them that there was a chain left over there, whereupon his brothers remarked that they would keep that just like it was. **"We were using that for a road at that time of year. We had sold the mill but the road was still there."** (R. p. 222.) Again, F. E. ROGERS testified:

"Since the division between the heirs and the establishment of the 440 yard corner at the North and the establishment at the corner where the gear wheel is located, **a road has been open for the use of anyone who wanted to travel it.**" (R. pp. 223-4.)

In view of this pleading and testimony, the ruling of the court is clearly erroneous.

II.

This Court erred in holding that "since the deed as prepared said nothing about a road as a boundary, there was no occasion to make a reservation of the land, though to some extent on its far edge it was used for a road," the rule being, as well established by both State and Federal authorities, that it is not the call for the road, but the fact that the tract is bounded by a road, that makes applicable the rule of law that the fee to the roadway will pass by conveyance of the adjoining tract unless expressly reserved.

In *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, 88 A. L. R. 391, and also in *Texas Bitulithic Co. v. Warwick* (Tex. Com. App.), 293 S. W. 160, the rule announced in 9 *C. J.*, p. 200, was approved as follows:

"The presumption of an intent to convey title to the center of a street or highway is not overcome by the fact that the land is described by metes and bounds, and that the distances

stated in the description of the deed do not extend to the center of the street."

III.

This Court erred in holding that the presumption of law that the strip in controversy passed to J. F. Rogers by the deed to the adjoining tract could be rebutted by parol testimony, it being the rule established by applicable Texas authorities that such presumption is conclusive unless rebutted by appropriate language of the deed itself.

In *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448, the court approves the rule set forth in 9 *C. J.* 195, Section 83, viz:

"It is the established rule that a conveyance of land bounded on a street or highway carries with it the fee to the center thereof, subject to the easement of public way, provided the grantor at the time owned to the center **and there are no words of specific description to show a contrary intent.**"

So, in *Mitchell v. Bass*, 26 Tex. 372, the court said:

"The established doctrine of the common law is, that a conveyance of land bounded on a public highway, carries with it the fee to the centre of the road, as part and parcel of the grant. **Such is the legal construction of the grant, unless the inference that it was so in-**

tended, is rebutted by the express terms of the grant." (p. 380.)

This case was followed by *Texas Bitulithic Co. v. Warwick*, 293 S. W. 160, by the Texas Commission of Appeals, and also by *Rio Bravo Oil Co. v. Weed*, supra. To the same effect is *Roxana Petroleum Corp. v. Sutter*, 28 F. (2d) 159, by the Eighth Circuit, where the court held that the servient estate passes "*unless the intention not to do so be clearly indicated.*"

The strip being, under the pleadings of appellees and the theory of the trial court, left for a roadway, it would be immaterial whether it was ever opened or not. In *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448, it was said that: **"And it is also immaterial so far as the title is concerned that the road was never opened or that it was abandoned."** *Amerman v. M. K. & T. Ry. Co.*, 182 S. W. 54, was cited as sustaining the proposition. There, in partition of land among heirs, a tract was platted reserving a strip for a street, but the street was never opened and the city afterwards abandoned its rights therein by ordinance. It was held that the rights of the distributees were not dependent upon the acceptance by the public of the dedication or the abandonment of the street by the city. And in *Paine v. Consumers Forwarding & Storage Co.*, 71 F. 626, by Judge Taft while he was on the Circuit Court of Appeals, it was said:

"First, it is said that the principle is never applied except when there is an actual public highway forming a visible monument. The case of Hopkinson v. McKnight, 31 N. J. Law, 427, is relied upon to sustain this proposition. **The weight of authority is, however, decidedly to the contrary.** *In the case of Stark and Wales v. Coffin, 105 Mass. 328, it was held that a deed conveying part of a tract of land as bounded 'by a passageway of fifteen feet wide,' leading across the tract, with no restriction or controlling words, passes the fee to the center of the way so assumed as a monument, although no such way existed at the date of the deed, or has ever been fenced off, and although the deed provided that the passageway was to be held in common forever by the parties to the deed."* (71 F. 630.)

IV.

This Court erred in denying appellant's plea of innocent purchaser because of a want of proof of bona fides and lack of notice, and in holding that the burden of proof was on appellant, for the reason that under controlling Texas decisions, appellant was the holder of the legal title, the Rogers having at most only the equitable title, and it was incumbent upon appellees to prove either notice to appellant or that it was not a purchaser for value.

J. H. Simmons, the surveyor, knew where the Wiley Davis corner was located because he had run out the Bozeman partition of the west half of the

Thomason Survey in 1891, but a short time before (R. pp. 191-193). F. E. Rogers, one of the appellees, who accompanied Simmons when he partitioned the Rogers land, knew where the pine tree marking Davis' corner was, and also where Davis' east line was, testifying that there were marked trees along Davis' east line and their west line, which were cut down when he built the road (R. pp. 225-226). So that it is clear that there was no mistake as to where the north line of the tract in controversy, calling for the Wiley Davis northeast corner, would stop. The deed therefore passed to appellant's predecessor in title, the legal title to the strip in question. *Swann v. Mills*, 219 S. W. 850, by the Texas Court of Civil Appeals. This case is directly in point and holds that the legal title passed.

It was necessary therefore for appellees as the holders at most of the equitable title to prove want of notice or lack of consideration paid. The case of *Teagarden v. Godley Lumber Co.*, 105 Tex. 616, 154 S. W. 973, was cited in our brief (p. 137). The rule is thus tersely stated in the late case of *White v. Hix*, 104 S. W. (2d) 136:

> *"It is thoroughly settled that one who claims a superior equitable title to land as against one who has purchased from the holder of the legal title must show that such purchaser did not purchase for value or purchased with notice of the outstanding equity.* Teagarden v. R. B. Godley Lumber Co., 105 Tex. 616, 154 S. W.

973; Commonwealth B. & L. Ass'n v. Howard (Tex. Civ. App.), 61 S. W. (2d) 546; Moore v. Humble Oil & Ref. Co. (Tex. Civ. App.), 85 S. W. (2d) 943, 944; Tarkenton v. Marshall (Tex. Civ. App.), 91 S. W. (2d) 473. The same rule applies in favor of lien holders. Texas Loan Agency v. Taylor, 88 Tex. 47, 29 S. W. 1057; McAlpine v. Burnett, 23 Tex. 649, 650." (pp. 139-40.)

These decisions are binding on the United States Courts. See *Mason v. United States*, 260 U. S. 545, 67 L. Ed. 396, a suit in equity, and *Erie Railroad Co. v. Tompkins*, 82 L. Ed. (Adv. Ops.) 787, a suit at law.

Therefore, *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69, is directly in point and controlling. This decision clearly confers upon appellant the status of an innocent purchaser, and this Court therefore erred in not so holding.

V.

This Court erred in holding appellant's defense of innocent purchaser unavailing for want of proof, since appellant's allegations that it was such bona fide purchaser without notice were not denied and therefore it was not incumbent upon appellant to support same by proof.

The answer of defendants contained a cross action (R. pp. 37-43), to which appellant, plaintiff

below, duly made replication as required by Equity Rule No. 30. (R. pp. 43-48.) In Paragraph IV thereof appearing on page 45 of the Records it was distinctly alleged:

"* * * Complainant avers that it and its predecessors in title purchased in good faith, paying a valuable consideration therefor, the oil and gas lease which it now owns and holds, relying upon the call in the deed and oil and gas lease for the Wiley Davis Northeast corner as marking and fixing the Northwest corner of the tract of land conveyed by J. W. Rogers and others to F. E. Rogers, and without any knowledge or notice of the claims now asserted by defendants to the strip of land described in the purported oil and gas lease from F. E. Rogers, et al, to B. P. Dunlap and without any notice or knowledge that the call from the Wiley Davis Northeast corner was inserted by mistake in the deeds and oil and gas lease (if such call was inserted through mistake, which Complainant does not admit but denies)."

These allegations were not denied.

VI.

There being no proof showing that W. B. Chandler, appellant's immediate vendor, did not purchase for value and without notice, appellant's defense of innocent purchaser under Chandler should have been sustained, the burden being upon appellees to show notice or failure to pay value, the legal title passing to Chandler under his oil and gas lease, under the authorities above cited.

VII.

Under Appellees' testimony and theory, the strip in controversy was left for a road in the partition of 1899, and at all events title passed to J. F. Rogers under his deed, it being settled law that conveyance of land bounded by a road carries title to the grantor's interest in the road, subject to the easement of roadway, unless expressly reserved.

The testimony of F. E. Rogers was that when they ran the north line of the J. F. Rogers tract and came to the end of 440 yards, Simmons said to the boys that they had a chain left over there and "my two oldest brothers said: 'we will just keep that like it is.' *We were using that for a road at that time of year. We had sold the mill but the road was still there.*" (R. p. 222.) This makes the Texas case of *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448, directly controlling. There in par-

tition in the District Court of Gregg County, the decree described Lot No. 5 by metes and bounds as keeping 30 feet from Lot No. 2 as a road reservation. A road was never established on the strip. The purchaser of the lot conveyed and it was held that such conveyance, although by metes and bounds, conveyed title to the road reservation. The Court cited *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391, and said that:

> "* * * And it is also immaterial, so far as the title is concerned, that the road was never opened or that it was abandoned."

In the *Weed Case* lots were laid out abutting on the railway right-of-way, and it was held that the right-of-way passed by conveyances of the lots. The authorities in Texas hold that title to the road passes unless expressly reserved or excepted in the deed. *Mitchell v. Bass*, 26 Tex. 372; *Texas Bitulithic Co. v. Warwick*, 293 S. W. 160; *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. 1080, 85 A. L. R. 391. In the latter case it was said that:

> "In other words, when a person conveys a piece of property abutting upon a public highway or non-navigable stream it is but natural to assume, in the absence of an express reservation to the contrary, that he intends to convey the same with all of the beneficial rights enjoyed by him in its use." (p. 438.)

The intention on the part of the grantor to with-

hold his interest in the road or street, after parting with his interest in the abutting land, is never to be presumed. *Wiess v. Goodhue*, 102 S. W. 793, writ refused.

VIII.

The Court erred in holding that parol evidence was admissible to show that the grantors in the deed to J. F. Rogers intended to reserve the strip in controversy as a roadway, it being the Texas rule that such testimony is inadmissible in the absence of a reservation in the deed (Gulf Production Co. v. Warren, 99 S. W. (2d) 616, writ refused), and such decisions being binding on the Federal Courts under the cases of Mason v. United States, 260 U. S. 545, 558, 67 L. Ed. 396, 401, and Erie Railroad Co. v. Tompkins, 82 L. Ed. 787.

In the *Warren Case* the metes and bounds description extended to the inner edge of the right-of-way, and it was sought to show by parol that lessors showed the lessees the extent of the land leased which did not include the right-of-way. The Court held this inadmissible, saying:

> "But, for this additional, fundamental reason, this assignment is without merit. On the face of the lease made by appellee to appellants, by the very terms of that lease, by the use of language many times construed by the courts where the issue of title to the center of a way was under consideration—language of

identical import—appellants acquired title to the center of the right of way. The language of the lease was not ambiguous; its legal significance was perfectly clear; therefore, parol evidence to the effect that 'Mr. Cartwright, prior to the execution of the lease in question, went upon the ground and specifically pointed out the tract to be covered by the lease, which designation did not include the railroad right of way tract,' was not admissible, but if received, was without probative force in the construction of the lease. 18 C. J. 252. This rule was given controlling effect by the Commission of Appeals in the Rio Bravo Case." (p. 626.)

Refusal of a Writ of Error by the Supreme Court under our present statute had the effect of approving the opinion of the Court of Civil Appeals (Article 1728, 3 *Vernons' Rev. Stats. of 1925*, Pamphlet Supp.)

IX.

This Court erred in holding that the oral testimony of the witnesses as to the survey was not contradicted by the field notes introduced in evidence, such field notes showing that Simmons ran to the Bozeman line for the southwest corner of the J. F. Rogers tract, marking trees for corner, and did not stop at the point marked by the gear wheel.

Simmons, the surveyor, knew where the Bozeman east line which coincided with the Rogers west line,

was, since he had run out the Bozeman partition of the west half of the Thomason Survey in 1891, but a few years before the partition of the Rogers land (R. 191-193).

The field notes of the surveyor J. H. Simmons on page 266 of the Records show that he started at the northeast corner of the tract and ran south 880 yards to corner 2, witness a Red Oak. This is the southeast corner of Lot 1. He then ran west 440 yards to corner 3, witnessed by a pine stump "which is center of Rogers' tract; thence west 440 yards to corner 4 to Bozeman land pine S. 65° W. 6 L. and pine S 80° East 14 L; then come back to corner 3 center of tract and run north 880 yards to corner 5; pine N 40° E. 5½ L. and pine S. 32° W. 11 L," etc. This with the accompanying plat shows as we think that he surveyed from the northeast corner of the whole tract south 880 yards, then ran across to the Bozeman line where he calls for trees instead of a stake. It is to be noted that F. E. Rogers testified that when he went around with Simmons in making the survey that "when he went west from the southeast corner on the east line of the Thomason Survey 880 yards where I said he set the stake and the bevelled gear is now driven, he did not mark any trees. There were just little saplings there; he put down a stake and did not mark any trees." (R. pp. 262-263.)

There is but one conclusion to be drawn from these notes and the plat, it seems to us, and that is

that Simmons surveyed from the northeast corner south to the southeast corner of Lot 1, the W. H. Rogers Tract, and ran west to the Bozeman line, which he of course was familiar with, having run it out but a few years before, then came back as he says to corner 3 and ran north to the north line, and then ran east 440 yards to the starting point. He then, as shown by the notes on page 265, started again at corner 2, the southeast corner of the W. H. Rogers Tract No. 1 and ran west 374 yards, north 308 yards, west two calls of 66 and 154 yards, south 310 yards and west 224 yards to corner 4 where he again calls for the same pine witness trees that he had called for in Bozeman's land (R. p. 267) in his survey of Tract No. 1. It will be noted that he did not call for bearings at the southeast or southwest corners of the tract, the only bearing trees called for being at the northeast and southeast corner of Tract No. 1, corner No. 3, which would be the center of the tract; corner No. 4 on the Bozeman line and corner No. 5 at the northwest corner of Tract No. 1 and the northeast corner of the J. F. Rogers Tract No. 2. A reference to the plat on page 266 will make this clear and show all of the surveying that Simmons did. The call for the Bozeman line (or land) at corner No. 4 with bearing trees, is consistent with the calls for the Wiley Davis northeast corner, because such corner was an extension of the Bozeman line north.

X.

This Court erred in holding that the call for distance from the northwest corner of the W. H. Rogers tract No. One of 440 yards, should control, and not the call for the Wiley Davis northeast corner, since it clearly appears from the field notes introduced in evidence made by Simmons at the time of the survey that when he ran east on the south line of the J. F. Rogers tract No. Two he reached the Bozeman land which lay to the west of the Rogers land marking trees, such point being in a line extending north from the northeast corner of the Sheppard tract to the Wiley Davis northeast corner witnessed by a pine, and therefore the call for the northeast corner of the Davis land was not inserted by mistake.

As heretofore said, J. H. Simmons, the surveyor who partitioned the three Rogers' tracts, was familiar with the Bozeman land, having partitioned it in 1891 (R. pp. 191-193). Appellees' witness J. E. Sport was familiar with the Wiley Davis tract in 1892, and also the Bozeman and Rogers land. He testified that the pine tree witnessing the northeast corner of the Wiley Davis tract would be reached by extending the line from the Postoak tree at the southeast corner of the M. O. Sheppard 36 acre tract through the Redoak tree at the northeast corner of the tract on to the north line of the survey to the northeast corner of the Wiley Davis tract (R.

p. 238). The field notes (R. pp. 266-267) show that when Simmons ran west from the center of the Rogers tract he reached corner 4 "to Bozeman land pine S. 65° W. 6 L. and pine S. 80° E. 14 L." He made but five corners according to the plat accompanying such notes shown on page 266, one at the northeast corner of the whole tract, which also was the northeast corner of Tract No. 1; the second at the southeast corner of Tract No. 1; corner 3 at the center of the Rogers tract, which would have been the southwest corner of the W. H. Rogers Tract No. 1 had not the tongue of land been cut out as shown at the top of the page; corner No. 5 at the northeast corner of Tract No. 2, the J. F. Rogers tract, and the northwest corner of Tract No. 1, and Corner No. 4 in the Bozeman line. When he reached corner No. 4 in the Bozeman line, then he was south of the Wiley Davis corner and at the southwest corner of the 66 ft. strip in controversy.

The parol evidence relied upon by the court to show the existence of the strip is clearly in conflict with this written testimony of the surveyor, contained in the field notes made at the time, especially when it is noted that corner No. 4 was witnessed by pine trees, whereas Rogers' testimony, on which the court based its findings, was to the effect that there were "just little saplings there: he put down a stake and did not mark any trees." (R. pp. 262-263.)

It is to be remembered also that the bevelled gear is a second-hand corner, placed there by J. E.

Rogers and Seth Davis in 1905, six years after the partition was made. (R. pp. 256-257.) At this time J. E. Rogers was a boy. There was nothing there at the time other than a post or a stake (R. p. 234); and this evidence seems clearly to indicate the unreliability of such parol testimony, especially when contradicted by the record of the field notes of the surveyor in his own handwriting.

XI.

This Court erred in holding that the language in the corrected lease "being the intention of the lessor herein to lease all land owned by them in said survey" did not cover and include the interest of lessors in the strip of land in question, the "survey" referred to being clearly the G. A. Thomas (Thomason) Headright, the land particularly described in the correction lease being referred to as a "tract" and not as a survey.

The correction lease appears in the Record, pp. 162-168. It describes the land as a part of the G. A. Thomas Headright, starting at the northeast corner of Lot 2 and calling for directions and distances, and after reaching the point of beginning, continues: "Said tract to contain 66-1/5 acres, more or less. It being the intention of the Lessor herein to lease all land owned by them in said survey and containing 66-1/5 acres, more or less." (R. pp. 163-164.)

The reference to the land particularly described as a "tract" shows that when the word "survey" was used, it was used in its ordinary signification and referred to the Thomason Survey.

XII.

The Court erred in holding that all of the rights of W. P. Chandler did not pass to and vest in appellant, including the lease on the disputed strip, it being expressly alleged in plaintiff's petition that "by assignment and conveyance plaintiff became on October 21, 1930, the owner of said oil, gas and mineral leasehold estate" (R. p. 24), and the only denial thereof being a general denial contained in paragraph VI of the answer, which general denial was wholly insufficient to raise an issue.

In Paragraph IV on page 24, appellant alleged that "by assignment and conveyance plaintiff became on October 21, 1930, the owner of said oil, gas and mineral leasehold estate and immediately went into possession thereof," etc. To this defendants answered that (PG. VI, Record, p. 32): "The defendants deny the allegations of Paragraph IV of the amended bill, especially the allegations that plaintiff immediately went into possession," etc., following with specific denials of other matters contained in said paragraph.

XIII.

This Court erred in not giving effect to the unassailed finding of the court below to the effect that the W. P. Chandler lease was assigned to plaintiff and is now owned by it and is a valid and subsisting lease.

The Court's finding of fact No. 12 is as follows:

"On October 20, 1930, said heirs of J. F. Rogers executed an oil, gas and mineral lease to W. P. Chandler using the same description contained in the said deed from W. H. Rogers, et al, to J. F. Rogers, excepting said two (2) acre J. W. Mings tract last above described, and stating 'it being the intention to include all land owned or claimed by Lessors in said survey.' Said lease was assigned to Complainant, and is now owned by it and is a valid and subsisting lease."

Such finding was not excepted to, nor attacked in any manner, and appellees' contention for the first time on appeal that the assignment did not convey the whole lease clearly is an afterthought, not raised below and therefore not available here.

XIV.

This Court erred in holding that the assignment from W. P. Chandler to Empire Gas and Fuel Company did not convey the whole lease, the tract in controversy not being a separate and distinct tract, but (if not clearly included in the description contained in the lease and assignment) only a small strip left for purposes of a roadway, and actually used as such at the time of the partition and later.

It is respectfully urged that the assignment from Chandler to the Empire Gas and Fuel Company appearing at pages 172-174 was sufficient to assign to such company the entire lease. The tract in controversy was not separately described in the lease and had never so far as the proof to our mind indicates, been regarded as a separate and distinct tract. The Chandler assignment refers to the oil and gas lease, giving the names of the lessors and lessee, describes the only property described in the lease, assigns it to the Empire Gas and Fuel Company and covenants that he is the lawful owner of the lease and all rights and interest thereunder. Had two tracts been separately described in the lease, or had the tract in controversy been a separate and distinct parcel, another question might have been presented; it is apparent, however, that Chandler was attempting to assign all of his rights under the lease, and this Court erred in giving the assignment such a narrow interpretation, especially

in view of the finding of the trial court above referred, and the fact that no such contention was raised below.

XV.

This Court erred in affirming the judgment below and thus in effect reforming a deed executed over thirty-four years before the trial below as against appellant's contention that such relief was barred by laches and limitation.

CONCLUSION

WHEREFORE, it is respectfully prayed that the judgment of affirmance heretofore entered herein be set aside, and in lieu thereof a judgment of reversal be rendered that justice may be done.

Counsel for Appellees are Wynne and Wynne of Longview, Texas, and they have been mailed copy of this motion.

CLAYTON L. ORN,
DAVID B. TRAMMELL,
Attorneys for Appellant.

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Of Counsel for Appellant.

DAVID B. TRAMMELL, one of counsel preparing the foregoing motion, hereby certifies that such motion is made in good faith; that in his opinion there is good ground for the same and that it is not interposed for delay.

DAVID B. TRAMMELL.

NOTE:

The opinion of the Court on the Motion for Rehearing, filed January 23, 1939, was ordered withdrawn by the Court on February 24, 1939, for correction, and as corrected was filed on February 24, 1939.

ORDER DENYING REHEARING.

Extract from the Minutes of January 23, 1939.

CITIES SERVICE OIL COMPANY,

No. 8863 versus

B. P. DUNLAP, ET AL.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

APPELLANT'S MOTION FOR LEAVE TO FILE SECOND MOTION FOR REHEARING and SECOND MOTION FOR REHEARING ATTACHED THERETO - FILED FEBRUARY 7, 1939.

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IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

CITIES SERVICE OIL COMPANY, *Appellant*
vs.
B. P. DUNLAP ET AL, *Appellees*
} *No. 8863*

Appellant's Motion for Leave to File Second Motion for Rehearing

To Said Honorable Court:

Cities Service Oil Company, appellant, with utmost deference, respectfully suggests to the court that in its opinion on rehearing, this Honorable Court overlooked the stipulation of counsel appearing on Record p. 208, concerning the development of the Rogers lease, and also misconstrued the effect of the Texas decisions which (in the opinion of counsel) clothe the purchaser of the legal title, as was W. P. Chandler and appellant in this case, with a presumption of law as to innocence, good faith and payment of consideration (which this court holds to be a rule of property *Turner v. California Co.* (C. C. A. 5 Tex.), 54 F. (2d) 552, 553); and also overlooked the provision of the Chandler lease obligating Chandler to offset wells within 150 feet of the leased premises (R. p. 142), which has been

held by the Texas courts to be sufficient consideration for a lease and to support the defense of innocent purchaser (*Jones v. Bevier*, 59 S. W. (2d) 945, writ denied) even where not specifically written into the lease but only implied (*Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, writ denied); and also misconstrued or overlooked the effect of the Texas decisions holding that $1.00 paid is a sufficient consideration for an oil and gas lease (*Emde v. Johnson*, 214 S. W. 575, writ denied, and other cases cited in the accompanying motion for rehearing), and also misconstrued as we think the effect of the decision of the Supreme Court of the United States in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487, applied to suits in equity by *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290; and also overlooked evidence in the opinion of counsel sufficient to discharge the burden of proof as to innocent purchaser, even if the rule announced by this court in its opinion on rehearing as to the burden of proof be followed. These being matters appearing for the first time in the opinion on motion for rehearing, counsel for appellant deem it their duty to call the attention of this court thereto for correction, in the first instance, and therefore with utmost deference, present to this Honorable Court their second motion for rehearing, and respectfully pray leave that the same be filed and considered, to the end that justice be done, especially in view of the extreme importance of the rule announced by this court, and

which counsel preparing this motion deem directly contrary to the *Erie* and *Ruhlin* Cases above referred to.

Counsel for appellees are Angus G. Wynne and W. A. Wade, Longview, Texas, to whom copies of this motion, as well as of the motion for rehearing accompanying same, have been forwarded by first class mail, properly addressed and with postage duly paid, at the time this motion and the motion for rehearing accompanying same is being sent to the Clerk.

WHEREFORE, appellant respectfully prays leave to file its second motion for rehearing, and that upon such rehearing, it be granted such relief as may be appropriate. See *Wichita Royalty Company v. City National Bank of Wichita Falls* (CCA 5), 97 F. 249.

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Of Counsel for Appellant.

DAVID B. TRAMMELL, one of counsel preparing the foregoing motion, certifies that such motion is made in good faith; that in his opinion there are good grounds for the same and that it is not interposed for delay.

DAVID B. TRAMMELL

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

CITIES SERVICE OIL COMPANY, *Appellant*

vs.

B. P. DUNLAP ET AL, *Appellees*

No. 8863

Second Motion for Rehearing

Cities Service Oil Company, Appellant, respectfully shows that in the opinion on rehearing herein filed on January 23, 1939, this Court committed errors, to appellant's prejudice, in the following particulars:

I.

This Court erred in its opinion in stating that "while it appears that the strip of land in dispute has never been developed, we have reviewed the record in a vain search for any proof that any land under the lease has been developed or anything otherwise paid for the lease. What we said in the former opinion about development seems founded on nothing in the record, and to have been a mere assumption," for the reason that there was an express stipulation that the land covered by the lease had been developed for oil and gas, such stipula-

tion appearing on page 208 of the Transcript and being in words as follows:

> "It is further stipulated that Empire Gas & Fuel Company and its successor in title, Empire Oil & Refining Company, said latter company having succeeded to all the title of the former company in and to said oil and gas leases, took possession of the land described in the oil and gas lease and the correction oil and gas lease, and drilled for oil thereon and has produced and is now producing oil from said land and has paid the rentals and royalties therein provided. It is further stipulated that none of the parties to this lawsuit have drilled any wells on the strip of land involved in this controversy." (R. pp. 208-9.)

II.

This Court erred in holding that there was no evidence of consideration adduced by Appellant, for the reasons:

(a) The original lease recites a consideration of $10.00 in hand paid, the royalties therein provided "and the agreements of lessee herein contained" (R. p. 139), and further that—"In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within one hundred fifty (150) feet of and draining the leased premises, lessee agrees to drill such offset wells as a reasonably prudent operator would drill under the same or similar circumstances." (R. p. 142.) This recital and agreement was expressly

held to be sufficient consideration to support an oil and gas lease in the Texas cases of *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied, and *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, writ denied, and sufficient to support the defense of innocent purchaser. The oil and gas leases in these cases were "unless" leases (that is, the lease terminated by its terms unless drilling was commenced within a certain term, or delay rental paid, there being no obligation to do either), the lease in *Jones v. Bevier* reciting a consideration of $1.00 paid, the royalties therein provided and the agreements of lessee therein contained, and the same provision above copied from the lease from appellees Rogers to Chandler, and the lease in the *Bailey v. Shell Petroleum Corp.* case reciting $1.00 cash and $1400.00 in oil, payable out of one-eighth (there being no obligation to drill, however). The Shell lease did not contain the express obligation to offset wells on adjoining tracts, but the Court held that such obligation would be implied, and therefore sufficient consideration to support the defense of innocent purchaser, saying:

> "On the theory that the lease contract was insufficient to support the defense of innocent purchaser, appellants have presented a most interesting argument, based upon National Oil & Pipe Line Co. v. Teel, 95 Tex. 586, 68 S. W. 979. Because the express consideration was only $1 and an obligation to pay $1,400 in oil, conditioned upon the discovery of oil, appellants contend that the instrument was without consideration, unilateral, and, therefore,

optional in its nature. *In its legal implications this instrument is on all fours with the lease before us in Jones v. Bevier*, 59 S. W. (2d) 945, 948. *On the principles of law there announced this instrument conveyed to the original lessee an interest in the land, that is, as said in Jones v. Bevier, the lease 'operated as a present conveyance of the oil and gas under the premises described in the lease, and vested in appellee a determinable fee in the oil and gas in place.' On this construction it follows that appellees, holding under a regular chain of title from appellants, could assert against them the defense of innocent purchaser.*

"We say in this case, as we said in Jones v. Bevier, that if the instrument required a consideration one was affirmatively expressed on its face, (a) the $1, and (b) the implied obligation to drill offset wells." (p. 985.)

Refusal of the writ in these two cases by the Supreme Court is an approval by the Supreme Court of the Court of Civil Appeals' opinion, under the express provisions of Art. 1728 (3 Vernon's Ann. Civ. Stats. of 1925, pamph. supp., Acts 1927, 40th Leg., p. 214, Ch. 144, Sec. 1), which so far as pertinent reads;

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the

Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction."

(b) The recitation of $10.00 paid in the Chandler lease (R. p. 139) was sufficient evidence of payment of a valuable consideration to support the lease and the defense of innocent purchaser, such being the express holding in the Texas cases of *Moss-Tate Inv. Co. v. Owens*, 22 S. W. (2d) 1096, writ denied (citing *Kelly v. Jackson*, 6 Pet. 622, 632, 8 L. Ed. 523); *Russell v. Beckert*, 195 S. W. 607; *Luna v. Johnston*, 11 S. W. (2d) 350; *Robertson v. Hefley*, 118 S. W. 1159; *City of San Saba v. Hudson*, 95 S. W. (2d) 1312, as well as by the cases of *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, and *Jones v. Bevier*, 59 S. W. (2d) 945, above cited, in both of which writs of error were denied.

It is also settled in Texas that $1.00 paid is sufficient consideration for an oil and gas lease. This is expressly held in the following cases: *Emde v. Johnson*, 214 S. W. 575; writ denied; *Hitson v. Gilman*, 220 S. W. 140; *McKay v. Tally*, 220 S. W. 167; *McKay v. Lucas*, 220 S. W. 172; *McKay v. Kilcrease*, 220 S. W. 177; *Johnson v. Russell*, 220 S. W. 352, writ denied; *Lone Star Gas Co. v. McCullough*, 220 S. W. 1114; *Leath v. Humble Oil & Refining Co.*, 223 S. W. 1022; *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied; *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, writ denied. These

cases are founded on the Supreme Court case of *Queve v. Gulf C. & S. F. R. R. Co.*, 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734, 1 Ann. Cas. 545, where the Supreme Court of Texas held that a recital of $1.00 paid was sufficient consideration for the release of damages for personal injuries. Indeed, this is the rule obtaining generally (18 *C. J.* p. 166, Sec. 47) except in Louisiana (*George v. Manhattan Land & Fruit Co.*, (CCA 5), 51 F. (2d) 28), and numerous cases could be cited to support such rule. See, also, *Corsicana Petroleum Co. v. Owens*, 110 Tex. 568, 222 S. W. 154, where a recited consideration of $28.20 was held sufficient to support a lease, which provided that the lease might be surrendered by the payment of $5.00 and all other amounts due at the time of the surrender, the court adverting to the fact that the consideration was satisfactory to the grantors themselves and there could be no reason for the court striking down that part of it.

It is also the rule, supported both by Federal and State authorities, that the written receipt of the consideration is at least prima facie evidence of the payment thereof, and sufficient to require the person attacking the deed or other instrument to prove otherwise; in other words, such acknowledgment is sufficient to discharge the burden of proof in the absence of countervailing testimony. *New York Life Ins. Co. v. Seifris* (CCA Pa.), 46 F. (2d) 391; *Heiskell v. Curtis* (App. D. C.), 259 F. 987; *DeArnaud v. U. S.*, 151 U. S. 483, 38 L. Ed. 244; *Russell v. Beckert*, 195 S. W. 607; *Moss-Tate Inv.*

Co. v. Owens, 22 S. W. (2d) 1096, writ denied; *Luna v. Johnston*, 11 S. W. (2d) 350; *Haze v. Home Friendly Ins. Co.* (Md.), 197 A. 632; *City of San Saba v. Hudson*, 95 S. W. (2d) 1312; *Stowe v. Belfast Savings Bank*, 92 F. 90, aff. 92 F. 100; *Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912b 360 and note. In the last case it was said:

"* * * In the lease before us we find a valuable consideration paid, as it recites the payment of one dollar down. * * * **Look back at hundreds of deeds through hundreds of years and you will find them stating one dollar as a valuable consideration. To say that such a consideration acknowledged under seal is not good would be to overthrow myriads of deeds. The parties have chosen to treat it as a sufficient consideration; they have contracted that it shall be such; and no court, in the absence of fraud, can nullify their contract.**" (Ann. Cas. 1912b, p. 361.)

In *New York Life Ins. Co. v. Seifris* (CCA 3 Pa.), 46 F. (2d) 391, the court said:

"* * * Something more is required when a party takes the stand to contradict what he has previously, and deliberately, said under his own hand or, as here, under its own seal. *A receipt is a written acknowledgment of payment and therefore evidence of payment. Moreover, it is evidence of a high order because it is the creditor's admission against interest that the debtor has paid his debt.*" (p. 392.)

In *Heiskell v. Curtis* (App. D. C.), 259 F. 987, it was said:

> *"The single assignment of error relates to the burden of proof. It is urged by counsel for defendant that the receipted bill is prima facie evidence of payment, and the burden is upon plaintiff to overcome this presumption. It is undoubtedly the law that a receipt is evidence of a high character as to the truth of its recitals, and while it may be explained by parol evidence, the burden of proof rests upon the one attacking it.* Jones on Evidence, Sec. 492." (p. 988.)

In the Texas case of *Luna v. Johnston*, 11 S. W. (2d) 350, the rule is thus stated:

> "The deed which conveyed the property in question to appellee was executed five years after he and his wife were married, and recited a cash payment of $500. **A recitation of payment in a deed is prima facie evidence that the amount named therein was actually paid, and the burden is upon the person attacking same to show a different consideration.** Russell v. Beckert (Tex. Civ. App.), 195 S. W. 607; Robertson v. Hefley, 55 Tex. Civ. App. 368, 118 S. W. 1159; Whitlock v. Barham & Duncan, 172 Ark. 198, 288 S. W. 4." (p. 351.)

In *City of San Saba v. Hudson*, 95 S. W. (2d) 1312, appellee sued in trespass to try title to recover certain property in the town of San Saba and the city sought by cross action to recover damages on

the general warranty of title contained in its deed. The sole question was whether or not there was in fact any consideration for the deed, and the court said:

> *"The recited consideration of $2,000 in the deed is sufficient in law, and the burden was upon appellants, particularly the interveners who were liable on their warranty of title to the city of San Saba, to show that there was in fact no consideration for the deed."* (p. 1313.)

The rule is thus stated in *Corpus Juris* (66 C. J. p. 1129, Sec. 946):

> *"But purchasers from a grantee are entitled to accept as true express recitals of a deed to their grantor as to the consideration."* (66 *C.J.* 1129.)

(c) The evidence was plainly sufficient to show that Chandler was a purchaser without notice of any mistake in the call for the Wiley Davis corner, the lease to him describing the property identically as in the deed from the Rogers heirs to J. F. Rogers in 1899, and containing the further recitation that it was the same land described in the deed from J. W. Rogers, W. H. Rogers and F. E. Rogers to J. F. Rogers February 28, 1899, recorded in Vol. R, p. 59, Deed Records of Gregg County, Texas, except 2 acres out of the northwest corner sold to R. M. Wood. (R. p. 139 for description in Chandler lease; R. pp. 105-106 for description in deed from J. W. Rogers et al., to J. F. Rogers.) As to the

Empire Gas & Fuel Company the evidence shows that Chandler made an assignment by the same description the next day after his lease was dated (R. p. 138 for date of Chandler lease; R. p. 172 for date of Chandler assignment.) It was not until the latter part of April, 1931, that the land was surveyed by the Empire Gas & Fuel Company (R. p. 144), at which time J. E. Rogers, one of the sons of J. F. Rogers, showed the Empire surveyor the corners. At the time of the survey they had the description of the tract as contained in the Chandler lease, but had to go to Longview to get the description of the 2 acre tract in the northwest corner, from the County Records (R. p. 149). This 2 acre tract which adjoined the Wiley Davis corner was located from its bearing trees by John F. Baker, Surveyor, and its northwest corner (adjoining the Wiley Davis N. E. corner) was in the road, which at that time was about sixty feet wide, well graveled and muchly traveled (R. p. 123). This survey was made in 1934 (R. p. 95). In addition it is to be noted that defendants alleged in their cross action that "they leased in good faith to W. P. Chandler the land described in the lease dated October 20, 1930." (R. bottom p. 37.)

The correction lease was not made until May 8, 1931. (R. p. 168.) Empire Gas & Fuel Co. would be protected, regardless of its knowledge or status, unless appellees were entitled to relief against Chandler (*American Mtg. Co. v. O'Hara* (CCA 9), 56 F. 278; *Hopper v. Tancil*, 3 S. W. (2d) 67).

III.

This Court erred in holding on rehearing that the question involved was a mere matter of procedure, the rule established by Texas decisions being on the contrary that the purchaser of the legal title, in a controversy with the holder of the equitable title or claimant of an equitable right, is presumptively an innocent purchaser without notice, such rule being a presumption of law and a rule of property (*Turner v. California Co.* (C. C. A. 5 Tex.), 54 F. (2d) 552, 553) and it being necessary under Texas decisions for the holder of the equitable title or claimant of the equitable right to dispel such presumption by affirmative pleading and proof.

This Court concludes that "we have here not a case where a Texas statute has created the right asserted, or has created a presumption, or is in any manner to be applied as construed in Texas." It is our understanding that federal courts were required to apply applicable state statutes by the Act of September 24, 1789, and that *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487, only applied this binding effect to rules of law established by decisions of the highest courts of a state, which had theretofore been given to statutes. In other words, while bound by Congressional mandate to follow applicable state statutes, Federal Courts previous to the *Erie R. R. Co.* Case in matters of general law not controlled by statutes refused to follow principles of law as settled by state

decisions; but that *Erie R. R. Co. v. Tompkins* in overruling *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865, held that Federal Courts should also follow applicable state decisions in the same way and to the same extent. Such rule was applied to equity cases by *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290, as well.

It is settled, we think, by Texas decisions, that the purchase of the legal title is attended with a presumption of innocence, good faith and value paid, in a controversy between the holder of such title and the claimant of an equitable right or the holder of an equitable title. Thus in *Ritch v. Jarvis*, 64 S. W. (2d) 831, it was said:

> " * * * **Certain defendants held under regular mesne conveyances from S. Jarvis. These defendants are presumptively innocent purchasers. They are the alleged holders of the legal title under regular conveyance from S. Jarvis. Plaintiffs are the alleged owners of the equitable title, in that their cause of action is a suit in equity to set aside the judgment and recover the legal title.** When the holder of the equitable title seeks to recover the legal title from a subsequent purchaser thereof, the burden is on him to plead and prove that such holder of the legal title is not an innocent purchaser. Elliott v. Wallace (Tex. Civ. App.), 42 S. W. (2d) 1058; Crow v. Van Ness (Tex. Civ. App.), 232 S. W. 539; Crawford v. McDonald, 88 Tex. 626, 33 S. W. 325, 328; Teagarden v. R. B. Godley Lbr. Co., 105 Tex. 616, 154 S.

W. 973; Day v. Johnson, 32 Tex. Civ. App. 107, 72 S. W. 426." (pp. 834-5.)

Again in *R. B. Godley Lbr. Co. v. Teagarden*, 135 S. W. 1109 (aff. *Teagarden v. R. B. Godley Lbr. Co.*, 105 Tex. 616, 154 S. W. 973), it was said:

"* * * **Is is clear that, as against an equity or equitable estate, the holder of the legal title is presumed to be a holder in good faith.** The well-established rule is that one who seeks to establish an equity or equitable interest as against the holder of the legal title has the burden of proving notice of his equity to the holder of the legal title at the time of his purchase. Cameron v. Romele, 53 Tex. 242; Oaks v. West, 64 S. W. 1036; Saunders v. Isbell, 5 Tex. Civ. App. 515, 24 S. W. 307; Halbert v. De Bode, 15 Tex. Civ. App. 630, 40 S. W. 1011; Turner v. Cochran, 63 S. W. 155." (135 S. W. 1114.)

In affirming the case the Supreme Court said the same thing in the following language:

"The right of the plaintiff Teagarden in the land is an equity. The Godley Lumber Company has the legal title. The rule is that under this state of facts the burden was upon plaintiff to show notice to the Godley Lumber Company. Barnes v. Jamison, 24 Texas 362; Baldwin v. Root, 90 Texas 546, 40 S. W. 8; Rogers v. Houston, 94 Texas 403, 60 S. W. 869." (105 Tex. 620.)

The opinion of the Court in *Garrison v. Crowell*,

67 Tex. 626, 4 S. W. 69, by Judge Gaines states the rule contended for in the following language:

> "It does not appear that he knew that the distance of the west line called for in the deed would not reach the Hodges corner and the Davis line; therefore, there was nothing on the face of the conveyance to put him upon inquiry as to any claim on the part of appellant. He found Stephens in possession of the premises in controversy, holding under a duly recorded deed from appellant himself, which, according to well established rules of construction, embraced the land so possessed. He paid his money upon the faith of a conveyance which imputed an absolute title in his vendor, at least against appellant in this case, and we fail to see any reason why he should be excepted from the rule which protects the innocent purchaser for value against the claim of his adversary which was unknown to him at the time of his purchase." (p. 628 of 67 Tex.)

Judge Stayton in *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909, in holding that a wife's title was equitable and that a purchaser from the husband without notice would take free from her rights, said:

> "It can not be denied that the beneficial interest of husband and wife in their community property is equal, and so without regard to the fact that it may have been conveyed in terms to one only; but does it follow from this that both take a legal title as these words are

used with reference to the rules giving protection to bona fide purchasers? Protection is given to a bona fide purchaser on the ground that it would be unjust to deprive him of property which he has purchased from another holding all the evidences of right necessary under the law to show that he is the true owner of the thing purchased; and when a person not having the entire beneficial interest is permitted by those having adverse interests to hold the evidences of perfect right in himself prescribed by law for the purpose, among others, of showing who the true owner is, **then the law imputes to those having such adverse interests some degree of negligence, for which they ought to suffer rather than that loss should be imposed on a bona fide purchaser from one holding the evidences of complete ownership.**" (82 Tex. 590.)

In *Turner v. California Company*, 54 F. (2d) 552, in an appeal from the Western District of Texas, suit was brought by the California Company to quiet its title against parties claiming under the children of a deceased wife of appellee's lessor. This court said that "York [appellee's lessor] had the legal title which would pass upon his conveyance to a bona fide purchaser for value without notice of the equitable interest of his wife during her life or of her children after her death," citing *Patty v. Middleton*, supra, and other cases, and that "*appellee therefore acquired the legal title to its lease freed from any equitable interest unless its knowledge*

that York was a widower at the time he executed the lease constituted notice which upon inquiry would have disclosed that the land was community property." It was concluded that under Texas decisions this was not sufficient to put the California Company on inquiry and the judgment was affirmed, this court saying:

> "* * * **As in our opinion a rule of property has been established in Texas as above indicated, we feel bound to follow it. Harrell v. United Carbon Co. (C. C. A.), 52 F. (2d) 790." (p. 553.)**

Under *Swann v. Mills*, 219 S. W. 850, and *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69, appellant is clearly the holder of the legal title, and defendants the claimants of an equitable right, or at most only an equitable title. As aptly said in *Swann v. Mills*, supra:

> "* * * *Whether Ingraham intended to do so or not, he executed a deed which conveyed to the true west boundary line of the Neil survey, and thereby invested his grantee with the legal title to all he described. Whatever interest remained in him by reason of a mistake in thus describing the land was an equity, of which there was no written record. One purchasing from Ingraham's grantee without notice of that equity would acquire title to all the land described in the deed.*" (219 S. W. 852.)

The facts here also make applicable the case of

Miller v. Southland Ins. Co., 68 S. W. (2d) 558, in that there the court, in following *Garrison v. Crowell*, supra, said "*there was nothing in its physical aspect or in its occupancy which could have put the insurance company upon notice of any claim adverse to M. K. Miller.*" (68 S. W. (2d) 563.) Here the two acre tract out of the northwest corner which was excepted from the property described in the Chandler lease (R. p. 139) was located by John F. Baker, surveyor for appellant, in 1934 (R. p. 95), the tree at the northeast corner called for being found, and the northwest corner, which would have adjoined the Wiley Davis corner, being in the road, Mr. Baker testifying: "*I did not find anything at the northwest corner of the tract, the corner being in the road. When I was there the road was about sixty feet wide and was a well graveled and muchly traveled road at the time.*" (R. p. 123.)

IV.

This Court erred in its opinion on rehearing in that the effect thereof is to grant appellees a reformation in 1938 of an instrument executed October 20, 1930, filed for record November 18, 1930, in a suit filed December 18, 1934, the description having originated in a deed dated February 28, 1899, filed February 10, 1900 (R. p. 105), without (a) an affirmative plea for reformation; (b) without any explanation in the appellees' cross bill why there had been a delay of over thirty years in attempting to have the description reformed; and (c) in direct violation of the four year statute of limitation of the state of Texas (Art. 5529, Vernon's Rev. Civ. Stats. of 1925.)

As stated the call for the Wiley Davis northeast corner originated in the deed from W. H. Rogers et al to J. F. Rogers, dated February 28, 1899, and filed for record February 10, 1900 (R. p. 105). In 1917 by deed recorded May 10, 1917, the wife and children of J. F. Rogers conveyed to J. W. Mings two acres out of the northwest corner of the tract in controversy, such tract witnessed by a postoak at the northeast corner, a black jack at the southwest corner *on the east side of the Union Grove public road and running north with the meanderings of such road to the place of beginning* (R. p. 122), and which corner in 1934 was in the public road then about sixty feet wide and well traveled and graveled. (R. p. 123.) Appellant's bill of com-

plaint was filed December 18, 1934 (R. p. 13), and the answer and cross action filed January 27, 1936 (R. p. 43). Such cross action or cross bill in the alternative prays that all claims of the Empire Gas & Fuel Company to the land described in the lease from Rogers to Dunlap be cancelled; that if the correction lease to the Empire be held valid, that a partition be had and that the interest of all of the heirs of Louisa Rogers, who did not join in such ratification lease, be set aside to Dunlap, etc. (R. pp. 42-43.) No excuse is alleged by appellees why the description of the J. F. Rogers tract calling for the Wiley Davis northeast corner, which had been recorded since 1900, was not sought to be corrected at an earlier date (R. pp. 28-43), and if such answer and cross bill can be construed to be one to reform either the deed to J. F. Rogers, or the lease to W. P. Chandler, it was barred by Article 5529, 16 *Vernon's Rev. Civ. Stats. of* 1925, which reads:

> "Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward." (p. 321.)

Not only was such relief barred by the Texas statutes of limitation, but also by equitable laches, as held both by this court and the Texas Supreme Court (*Connolly v. Hammond*, 51 Tex. 635; *Empire*

Gas & Fuel Co. v. Higgins Oil & Fuel Co. (CCA 5), 279 F. 977).

Of course, record of the deed from W. H. Rogers et al to J. F. Rogers and the lease from J. E. Rogers et al to W. P. Chandler affected the parties grantor therein with notice as to the mistake in description and limitation began to run as of such date. *J. R. Watkins Co. v. Gibbs*, 66 S. W. (2d) 355; *Central National Bank v. Barclay*, 254 S. W. 140; *Vodrie v. Tynan*, 57 S. W. 680; *Martinez v. Gutierrez's Heirs*, 172 S. W. 766, writ denied; *Calhoun v. Burton*, 64 Tex. 510; *Boren v. Boren*, 85 S. W. 48, writ denied; *Ryman v. Petruka*, 166 S. W. 711; *Lant v. Manley*, 71 F. 7; *Teall v. Schroder*, 158 U. S. 172, 39 L. Ed. 938; 20 *L. R. A.* (N. S.) 207, note.

V.

Counsel for appellees are Angus G. Wynne and W. A. Wade, who reside at Longview, Texas, and to whom copies of this motion have been sent by first class mail, properly addressed and with postage paid, at the same time that the motion is forwarded to the Clerk of this Honorable Court.

VI.

WHEREFORE, appellant respectfully prays this Honorable Court to grant it a rehearing, and upon such rehearing to reverse the judgment of the court below, and in lieu thereof enter a judgment quieting its title to the land in controversy, removing the clouds cast upon appellant's title by the claims of appellees and the various instruments evidencing same, and granting appellant such other and further relief as may be appropriate, including general relief.

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DAVID B. TRAMMELL, one of counsel preparing the foregoing motion, certifies that such motion is made in good faith; that in his opinion there are good grounds for the same and that it is not interposed for delay.

DAVID B. TRAMMELL

ORDER WITHDRAWING OPINION OF THE COURT FILED JANUARY 23, 1939, on MOTION FOR REHEARING, FOR CORRECTION.

Extract from the Minutes of February 24, 1939.

CITIES SERVICE OIL COMPANY,

No. 8863 versus

B. P. DUNLAP, ET AL.

ORDERED that the opinion on motion for rehearing filed January 23, 1939, in the above stated case be withdrawn for correction, and as corrected be filed herewith.

CORRECTED OPINION ON MOTION FOR REHEARING - FILED FEBRUARY 24, 1939.

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IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

No. 8863

CITIES SERVICE OIL COMPANY,

Appellant,

versus

B. P. DUNLAP, ET AL.,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Texas.

ON MOTION FOR REHEARING.

February 24, 1939

Before SIBLEY, HOLMES and McCORD, Circuit Judges.

SIBLEY, Circuit Judge: The motion for rehearing asserts that in the Texas courts the rule is established that on an issue of bona fide purchase for value without notice the burden of proof is upon him who attacks the legal title and asserts the equity, citing *White vs. Hix*, 104 S. W. (2) 136; and the contention is made that under the ruling in *Erie R. R. Co. vs. Tompkins*, ... U. S. ....., the State law should have been applied in this court.

In 66 C. J., Vendor and Purchaser, §1063, we find the Texas rule, supported by a multitude of Texas cases, stated as above, but as being exceptional. The rule elsewhere, also supported by abundant authority, is said to be: "As a general rule the person relying on the defense of a bona fide purchase for value without notice has the burden of proving such defense." The federal courts have held according to this general rule. In *Boone vs. Childs*, 10 Pet. at p. 212, upon an abundance of cited authority, the allegations required to raise the defense are stated in detail, and it is added: "Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchase without notice; the case stated must be made out." In *Smith vs. Auten*, 131 U. S. Appendix lxxv, lxxviii, it was said: "The rule which affords protection to a bonda fide purchaser without notice has no application to this case. To bring the defense within it it must be averred in the plea or answer *and proved* that the conveyance was by deed, that the vendor was seized of the legal title, and that all the purchase money was paid and paid before notice." In *Wright-Blodgett Co. vs. United States*, 236 U. S. 397, 403, after stating that bona fide purchase for value would be a perfect defense, the court continues: "But this is an affirmative defense, which the grantee must establish in order to defeat the Government's right to the cancellation of the conveyance which fraud alone is shown to have induced." *Boone vs. Childs*, and *Smith vs. Auten*, and other authorities are cited for the statement. In this court the question was directly ruled in *Johnson vs. Georgia Loan & Trust Co.*, 141 Fed. 593. A like conclusion was reached in *Nickerson, Trustee, vs. Meacham*, 14 Fed. 881; *Tobey vs. Kilbourne*, 222 Fed. 760; *Meyer vs. Ritter*, 268 Fed. 937; *Mercantile Trust Co. vs. Chicago*, 123 Fed. 393, 395. We have found no federal case to the contrary.

In the present case the appellant is the original

complainant, seeking a decree quieting its title. It has entered a court of equity, asking equity and bound to do equity. The defendants in their answer set up a mistake, correctable in equity, in the partition deed made to complainant's grantor, J. F. Rogers. Complainant replies, denying the alleged mistake and alleging additionally in very general terms that it and its predecessors in title purchased in good faith, paying value for the oil and gas lease it holds in reliance on the deed as written, and without notice or knowledge of the claim now asserted that the call for the Wiley Davis northeast corner was inserted by mistake. There was no further pleading.

The first contention made is that this averment in complainant's reply, not having been denied, stands admitted. It cannot be sustained. The former Equity Rules control, and provide for no answer to a reply, certainly not unless specially required by the court. If the answer contains a counter-claim, there is to be a reply, but new matter set up in the reply is not to be answered but is to be taken as denied. Equity Rule 31. Issue stands joined on the new facts alleged by this complainant's reply concerning its purchase for value without knowledge or notice. It seems to us that the burden of proving these facts ought reasonably to rest on the complainant, both because it has alleged them and they are essential to its success, and because they are peculiarly within its knowledge. The oil and gas lease was made to W. P. Chandler on Oct. 20, 1930, for a recited payment of $10.00 and royalties to be paid and other things promised. The very next day Chandler assigned the lease to complainant for a recited payment of $1.00 and other valuable considerations. Chandler's recited payment of $10.00 is a nominal consideration and not value. The recital, moreover, according to the federal cases above referred to, is no evidence at all of payment as against the defendants. The royalties and other things promised

were in the future, and could not have become due and have been paid by him before his assignment the next day. What the complainant itself paid, and with what knowledge, it of course knows and could easily prove. ~~While it appears that the strip of land in dispute has never been developed, we have reviewed the record in a vain search for any proof that any land under the lease has been developed or anything otherwise paid for the lease. What we said in the former opinion about development seems founded on nothing in the record, and to have been a mere assumption.~~ There is a ~~total~~ failure of evidence, not only as to bona fides and want of notice, but as to what was paid and to whom, and when and how; the details of which the maker of this plea has from the earliest time been held bound to allege and, when put in issue, to prove.

This seems to us a matter of practice or procedure and not a matter of substantive law. There is no question as to what are the rights of a bona fide purchaser, or as to whether the facts established make complainant out such, but only a question of how and by whom the facts shall be shown to the court. Such matters are not within the decision in *Erie R. R. Co. vs. Tompkins*, and the cases following it. At the very time these decisions were made, the Supreme Court was putting forward procedural rules to govern uniformly in the courts of the United States the practice in both law and equity cases, and was extending them even to questions of the admissibility of evidence and the competency of witnesses. Rule Civil Procedure 43. The procedure in equity cases has always been governed by a practice uniform over the United States and independent of that in the State courts. This was held proper in federal courts in Louisiana where as in Texas there are no separate courts of equity. *Livingston vs. Story*, 9 Pet. 631, *Story vs. Livingston*, 13 Pet. 358.

We have here not a case where a Texas statute has

created the right asserted, or has created a presumption, or is in any manner to be applied as construed in Texas. The question is simply what is the proper practice in courts of equity. The practice followed in the State courts of Texas, where equity courts as such do not exist, is not controlling.

REHEARING DENIED.

~~A true copy~~:
~~Teste~~:

.....

~~Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.~~

ORDER DENYING SECOND MOTION FOR REHEARING

Extract from the Minutes of February 24, 1939.

CITIES SERVICE OIL COMPANY,

No. 8863 versus

B. P. DUNLAP, ET AL.

It is ordered by the Court that the Second petition for rehearing filed in this cause be, and the same is hereby, denied.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA
UNITED STATES CIRCUIT COURT OF APPEALS
FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 329 to 397, next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8863, wherein Cities Service Oil Company is appellant, and B. P. Dunlap, et al., are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record, numbered 1 to 328 are identical with the printed record upon which said cause was heard and decided in the said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 8th day of March, A. D. 1939.

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

By /s/ E. WENDLING,
Deputy Clerk.

(SEAL)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 1, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.